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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PLEASANT VALLEY HOSPITAL, INC., and
PLEASANT VALLEY HOME MEDICAL
EQUIPMENT, INC.,
Petitioners,

v.

M & M MEDICAL SUPPLIES AND SERVICE, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER, to withstand summary judgment under Rule 56(e) of the Federal Rules of Civil Procedure, an expert's affidavit must provide both the reasoning or methodology, and the essential, specific factual elements which support the expert's ultimate conclusions; and whether, pursuant to Rule 703 of the Federal Rules of Evidence, the methods and factual elements must be of the type reasonably relied upon by experts in the particular field.

WHETHER the quantum of evidence necessary to establish a dangerous probability of monopolization is dependent on the type and extent of the evidence provided regarding the other two elements of an attempt to monopolize claim—i.e., a specific intent to monopolize and exclusionary conduct in furtherance of the unlawful intent.

WHETHER "monopoly leveraging" can be a separate and cognizable cause of action under Section 2 of the Sherman Act without a dangerous probability of monopolization in the secondary market.

LIST OF PARTIES

All of the Appellees in the proceedings below are Petitioners before this Court. The Petitioners include Pleasant Valley Hospital, Inc., and Pleasant Valley Home Medical Equipment, Inc. Pleasant Valley Hospital, Inc. is a nonprofit corporation which does not have a parent company. Its only subsidiary is Pleasant Valley Home Medical Equipment, Inc., which is wholly owned by the hospital. Pleasant Valley Medical Equipment, Inc. has no subsidiaries or affiliates.

The Respondent, M & M Medical Supplies and Service, Inc., is the Appellant in the proceedings below. M & M Medical Supplies and Service, Inc. is a closely held corporation with no subsidiaries or affiliates.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit on Rehearing En Banc is reported at 981 F.2d 160, and is set forth at Appendix A to the Petition ("Appendix") at 1a. The decision of the United States Court of Appeals for the Fourth Circuit is reported at 946 F.2d 886, and the unpublished panel opinion is set forth at Appendix B at 31a. The Opinion of the United States District Court for the Southern District of West Virginia, at Parkersburg, is reported at 738 F. Supp. 1017, and is set forth at Appendix C at 45a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was filed and entered on October

22, 1991. Appendix B at 31a. Subsequently, on November 4, 1991, the Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was granted by an Order dated February 14, 1992. Appendix D at 56a. The judgment of the United States Court of Appeals for the Fourth Circuit on Rehearing En Banc was filed and entered on December 9, 1992. Appendix A at 1a. On December 23, 1992, Petitioners filed a Petition for Rehearing which was denied by an Order dated January 22, 1993. Appendix E at 58a. This Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes:

Section 2 of the Sherman Act, 15 U.S.C. section 2, which provides, in pertinent part, that:

> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Rule 56(e) of the Federal Rules of Civil Procedure, which provides, in pertinent part, that:

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 703 of the Federal Rules of Evidence, which provides, in pertinent part, that:

> [i]f of a type reasonably relied upon by experts in the particular field in forming opinions or infer-

ences upon the subject, the facts or data need not be admissible in evidence.

STATEMENT OF THE CASE

Petitioners seek review of the en banc decision of the United States Court of Appeals for the Fourth Circuit that vacated the District Court decision granting summary judgment in favor of Petitioners. The basis of federal jurisdiction in the District Court is 28 U.S.C. section 1331.

I. STATEMENT OF THE FACTS

This case involves the marketing of durable medical equipment, medical supplies and prosthetic devices ("DME") to persons for use at home. DME suppliers both rent and sell such equipment, and obtain their customers through a variety of sources, including direct patient or family selection; advertising; and referrals from physicians, nursing homes, hospitals, intermediate care facilities, and others. Affidavit of P.D. Krimm, Joint Appellate Appendix at 68-70.

Respondent M & M Medical Supplies and Service, Inc. ("Respondent" or "M & M") is a retail dealer of DME, located in Point Pleasant, West Virginia, which has done business since approximately 1980. Petitioner Pleasant Valley Hospital ("PVH") is a 128-bed, acute-care hospital located in Point Pleasant, West Virginia. It is the only acute-care hospital in Mason County, West Virgina, and draws approximately 65% of its hospital patients from Mason County. PVH's remaining patients are drawn largely from Meigs and Gallia Counties, Ohio; both of which are contiguous to Mason County. Taken together the three counties are described as the "Tri-County Area." A bridge connects Mason County, West Virginia and Gallia County, Ohio. Meigs County and Gallia County both have acute-care hospitals which draw a portion of their patients from Mason County.

Petitioner Pleasant Valley Home Medical Equipment, Inc. ("PVHME") is a DME business, wholly-owned by Petitioner PVH. Like many similarly situated hospitals nationwide, PVH has sought new, but related, sources of income because, as a community-owned hospital, PVH has been adversely impacted by the changes in the government's Medicare/Medicaid payment standards. These changes—which include fixed per admission payments (Diagnostic Related Groups)—have provided strong incentives for many hospitals, including PVH, to cut costs and become more efficient, and to expand traditional services by vertically integrating into related businesses such as DME.[1] DME services, of course, are needed by some discharged hospital patients.

After rejecting an offer to purchase Respondent, PVH established PVHME in 1985.[2] The establishment of PVHME introduced an additional competitor into the local DME market. Currently, PVHME and four other DME companies, including Respondent, are located in Mason County, West Virginia.[3] Moreover, there are ten

[1] Vertical integration involves a market participant expanding its operations to different levels in the chain of distribution. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988).

[2] The en banc majority opinion incorrectly states that "the hospital first attempted to purchase M & M . . . ." In fact, the record reveals that it was Respondent which first approached PVH. Deposition of M. Sellards (Nov. 11, 1988) at 96-99. Michael Marnhout, principal owner of Respondent, offered to sell M & M—which in 1988 had an invested capital amount of less than $25,000—to PVH for $469,000. *See Id.*; Deposition of M. Marnhout (Nov. 10, 1988) at Exhibit 1 (1982 Balance Sheet for M & M).

[3] The en banc majority opinion incorrectly states that there are four DME companies located in Mason County. In fact, there are five companies: (1) Pleasant Valley Home Medical Equipment, Inc., Point Pleasant, West Virginia; (2) M & M Medical Supplies and Service, Inc., Point Pleasant, West Virginia; (3) Hockenberry Pharmacy North, Point Pleasant, West Virginia; (4) Fruth's Pharmacy, Point Pleasant, West Virginia; and (5) Health-Aid

DME dealers, including PVHME, operating in the contiguous Tri-County Area consisting of Gallia County, Ohio (in which the city of Gallipolis is located); Meigs County, Ohio (in which the city of Pomeroy is located); and Mason County, West Virginia (in which the city of Point Pleasant is located).[4] The competition for customers among DME companies in the area has been described by one competitor as "fierce." Affidavit of D. Dillon, Joint Appellate Appendix at 40.

Respondent has alleged that PVH used its access to hospital patients to exclude Respondent from the DME market by preferentially channelling, or steering, PVH hospital patients in need of DME to PVHME upon discharge. Respondent further has contended that the relevant geographic market for DME is limited to Mason County, and that PVH's ability to steer its patients needing DME to PVHME creates monopoly power within that DME market. However, the bulk of PVHME's customers were not referrals from PVH. Deposition of P.D. Krimm (Feb. 22, 1989) at 97-102; Defendants' Memorandum in Support of Summary Judgment, Exhibits 6, 7 (1988 PVH Referrals), Joint Appellate Appendix at 46-47.

The evidence offered by Respondent in support of its allegations with respect to the appropriate geographic market for DME, and PVHME's market and/or monopoly power within that geographic market, was an affidavit containing the professional opinions of Respondent's expert economist, Dr. Roger Blair.

Pharmacy, New Haven, West Virginia. Affidavit of D. Dillon, Joint Appellate Appendix at 40-42.

[4] The five additional DME suppliers located in Meigs County, Ohio and Gallia County, Ohio are: (1) Bowman's Medical, Gallipolis, Ohio; (2) Glasrock Home Health Care, Gallipolis, Ohio; (3) Medical Shoppe, Gallipolis, Ohio; (4) Gallia Medical, Gallipolis, Ohio; and (5) Continuity of Care, Pomeroy, Ohio. Affidavit of D. Dillon, Joint Appellate Appendix at 40-42.

In his affidavit, Dr. Blair stated:

> [f]or purposes of the affidavit, I have reviewed th Complaint and the material produced by Pleasa Valley Home Medical Equipment identifying th origin of their patients as well as patient origin da for Pleasant Valley Hospital. I have interviewe Michael Marnhout and other M & M Medical Su plies personnel. I have visited Point Pleasant, We Virginia and personally identified all companies rel vant to this case. I have made price comparisons f articles of durable medical equipment offered b Pleasant Valley Home Medical Equipment an M & M Supplies and Services.
>
> * * * *
>
> The relevant geographic market for hospital servic and durable medical equipment in this case is Maso County, West Virginia. The patient origin da strongly suggest that Mason County residents re predominantly upon Mason County suppliers f their hospital and medical equipment needs. Som overlap into the neighboring Ohio counties is to b expected but does not change the unmistakable co clusion that Mason County represents a distinct ge graphic market for antitrust analysis.
>
> Pleasant Valley Home Medical Equipment is exe cising monopoly power—i.e., the power to raise pri or exclude competition. Pleasant Valley Home Me ical Equipment has held its prices above tho charged by M & M Supplies and Services on nume ous articles of DME for over a year without losi significant numbers of customer[s]. This is a dire measure of monopoly power.

Appendix A at 6a-7a.

II. PROCEEDINGS BELOW

On August 9, 1988, Respondent instituted this civ action in the United States District Court for the Southe District of West Virginia, Parkersburg Division, again

Petitioners PVH and PVHME, alleging that Petitioners had violated the antitrust laws of the United States. Specifically, Respondent asserted six separate antitrust claims under Sections 1 and 2 of the Sherman Act, and Section 3 of the Clayton Act, including restraint of trade, monopolization, attempted monopolization, monopoly leveraging, conspiracy to monopolize, and exclusive dealing.

Under Section 1 of the Sherman Act, Respondent alleged that Petitioners' conduct constituted a contract, combination, and/or conspiracy in restraint of trade. Under Section 2 of the Sherman Act, Respondent alleged that Petitioners' conduct had resulted in the monopolization of the greater Point Pleasant, West Virginia, DME market, and that Petitioners had willfully acquired or maintained that monopoly power. Respondent also alleged that Petitioners engaged in a course of conduct with the specific intent to achieve monopoly power for PVH in the DME market. In addition, Respondent alleged that PVH engaged in monopoly leveraging by improperly using its monopoly power in the hospital market to gain an unfair competitive advantage in the DME Market.

Finally, Respondent alleged that Petitioners engaged in conduct which constituted a conspiracy to monopolize the DME market. Under Section 3 of the Clayton Act, Respondent alleged that Petitioners engaged in exclusive dealing by agreeing that PVH would deal with PVHME to the exclusion of all other competitors in the DME market.

On June 23, 1989, after the close of discovery, Petitioners, PVH and PVHME, filed a motion for summary judgment.[5] The District Court held that there existed no

[5] Significantly, in this case, Petitioners served Respondent with an interrogatory inquiring about its expert's opinions. On May 2, 1989, Respondent filed responses to Defendants' Combined Interrogatories and Request for Production of Documents to Plaintiff, and, in response to Interrogatory No. 2 which asked for the identification of expert witnesses and the facts and grounds for their

genuine issues of material fact as to any of Respondent's antitrust claims, and granted Petitioners' motion for summary judgment as to all claims.

Specifically, as to Respondent's restraint of trade claim under Section 1 of the Sherman Act, the District Court held that, as a matter of law, Petitioners were incapable of engaging in concerted action so as to violate Section 1 of the Sherman Act, because any agreement between a parent and its wholly owned subsidiary must be characterized as unilateral conduct. The District Court disposed of Respondent's exclusive dealing claim under Section 3 of the Clayton Act, and its conspiracy to monopolize claim under Section 2 of the Sherman Act in the same manner.

With respect to Respondent's Section 2 claims, the Court found the affidavit of Dr. Blair insufficient to establish that Petitioners had monopoly power over DME in the relevant geographic market. The District Court—through Chief Judge Haden—stated that the affidavit did not meet the requirement of Rule 56(e), because "an expert's affidavit 'must set forth specific facts showing that there is a genuine issue for trial.'" Appendix C at 49a. Judge Haden also noted that pursuant to Rule 703 of the Federal Rules of Evidence, an expert may rely on inadmissible facts only if those facts are of the type reasonably relied on by experts in that field. *Id.* As a result, the District Court found that Respondent had failed to establish an issue of fact regarding the relevant

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opinions, Respondent answered that "Dr. Blair's investigation of this case has not proceeded to the point where he has prepared a statement of opinions" and further added, "M & M Medical Supplies & Services, Inc., will supplement this answer when Dr. Blair has finalized his opinions and when M & M hires additional experts." However, at the time discovery was closed, Respondent had still not supplemented its response as promised. Thus, Dr. Blair's affidavit was the first, and, indeed, the only notification of Dr. Blair's opinions ever received by Petitioners.

geographic market, and PVHME's monopoly power within the DME market. Consequently, the Court found it unnecessary to reach the remaining elements of the monopolization claim; that is, the willful acquisition or maintenance of monopoly power through exclusionary conduct. The District Court also found no evidence in the record to support a triable inference that Petitioners had the specific intent to monopolize the DME market, and, on that basis, rejected Respondent's attempted monopolization claim as well. Finally, turning to Respondent's monopoly leveraging claim, the District Court held there was no such cognizable cause of action. *See* Appendix C at 45a.

On July 5, 1990, Respondent appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. On appeal, Respondent abandoned its exclusive dealing claim under Section 3 of the Clayton Act; its restraint of trade claim under Section 1 of the Sherman Act; and its conspiracy to monopolize claim under Section 2 of the Sherman Act.

Respondent's appeal did challenge the District Court's granting of summary judgment as to the monopolization, attempted monopolization, and monopoly leveraging claims under Section 2 of the Sherman Act. On October 22, 1991, by divided vote, a panel of the Court of Appeals for the Fourth Circuit vacated the District Court's Order, and remanded the case. *See* Appendix B at 31a.

On November 4, 1991, Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was granted by an Order dated February 14, 1992. Appendix D at 56a. On December 9, 1992, the Court of Appeals on rehearing en banc again vacated the District Court's judgment, by a 7-6 margin, and remanded the case. *See* Appendix A at 1a. Subsequently, Petitioners filed a Petition for Rehearing on December 23, 1992, which was denied by an Order dated January 22, 1993. Appendix E at 58a.

REASONS FOR GRANTING CERTIORARI

This case demonstrates a fundamental conflict among the Circuits regarding: (1) the sufficiency of expert affidavits under Rule 56(e) of the Federal Rules of Civil Procedure; and (2) the existence of "monopoly leveraging" as a separate and cognizable cause of action under Section 2 of the Sherman Act. This case also presents important questions regarding the scope of this Court's recent decision in *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884 (1993), with regard to both the "dangerous probability of monopolization" requirement in attempted monopolization cases under Section 2 of the Sherman Act, and the existence of "monopoly leveraging" as a separate, cognizable claim under Section 2.

These important legal issues have a significant impact on businesses of all types and sizes. Clear, uniform, and predictable summary judgment standards are essential to reduce the risks and uncertainty arising from unsupported claims in antitrust and other forms of litigation heavily dependent on expert opinion. In the health care field, clear antitrust standards are particularly important as hospitals and other entities seek to diversify in order to reduce costs and increase efficiency.

I. RESPONDENT'S EXPERT AFFIDAVIT DID NOT MEET THE STANDARDS REQUIRED TO WITHSTAND SUMMARY JUDGMENT

A. Respondent's Expert Affidavit Failed to Meet the Requirements of Rule 56(e) of the Federal Rules of Civil Procedure

The en banc majority held that "[Rule] 56(e) [of the Federal Rules of Civil Procedure] does not mandate exclusion of an affidavit for lack of the underlying data supporting an affiant's assertion of fact." Appendix A at 8a. However, Rule 56(e) does state that a party opposing a motion for summary judgment "*must set forth specific facts* showing that there is a genuine issue for trial." Fed.

R. Civ. P. 56(e) (emphasis supplied). Of course, for much expert testimony, including the testimony of antitrust economists, the inclusion of an accepted scientific methodology and of the essential factual elements derived from the underlying data is critical to the validity of the analysis. An expert's simple assertion of something as a fact does not make it so. Without an appropriate methodology and its essential factual elements, an expert's assertions remain conclusory and unsupported. They do not become "specific facts" which show that there are genuine issues for trial.

In determining that Dr. Blair's affidavit contained sufficient "specific facts" to withstand a motion for summary judgment, the en banc majority relied on other Courts of Appeals' decisions, including *Ambrosini v. Labarraque*, 966 F.2d 1464, 1470-71 (D.C. Cir. 1992); *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316-18 (9th Cir. 1985); and *Monks v. General Elec. Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990). These cases establish a permissive standard under Rule 56(e). Under this standard, an expert's affidavit is sufficient to withstand summary judgment if it merely identifies, or enumerates the types of data or facts considered by the expert. Neither the specific factual bases of the opinion, nor the reasoning (or methodology) applied by the expert are essential.[8]

The decisions cited by the en banc majority are inconsistent with a number of other Courts of Appeals' decisions. *See Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307 n.4 (5th Cir. 1990); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1338-40 (7th Cir. 1989); *Evers v. General Motors Corp.*, 770 F.2d 984, 985-87 (11th Cir. 1985); *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579-80 (11th Cir. 1985); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745

[8] Under those decisions, the specific factual basis, and methodology are considered to be "underlying facts" which need not be disclosed by the expert.

F.2d 248, 261-62 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 699-700 (9th Cir. 1981); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977).[7] These cases are quite explicit, and indeed unequivocal, in uniformly requiring the expert to provide a methodological and factual foundation for his or her conclusions. The expert must provide both the reasoning or methodology, and the essential, specific factual elements which support the ultimate conclusions. *Id.* Thus, the court in *Mid-State* stated that experts are not "fact" witnesses in the conventional sense.[8] It is the process of reasoning they apply which constitutes the "specific facts" required under Rule 56(e). *See Mid-State*, 877 F.2d at 1339. In addition, some of the cases call for an evaluation of the reliability of the actual sources of the facts used by the expert to support his or her opinion. *See, e.g., American Key*, 762 F.2d at 1580; *Slaughter*, 919 F.2d at 306-07. Finally, the court in *Merit Motors* implies that the Rule 56(e) requirements are heightened when the party submitting an expert's affidavit in opposition to summary judgment has had the opportunity for discovery. *Merit Motors*, 569 F.2d at 673.

This conflict regarding the appropriate standard by which to determine the sufficiency of an expert's affidavit under Rule 56(e) introduces significant uncertainty in

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[7] There are inconsistencies in approach even within different panels of the same Circuit. *See Ambrosini*, 966 F.2d at 1470-71; *Bulthuis v. Rexall Corp.*, 789 F.2d at 1318. The divergence of the case law, among and even within the Circuits, heightens the need for this Court to articulate a clear and uniform standard with respect to the sufficiency of expert affidavits under Rule 56(e).

[8] Unlike the cases cited by the en banc majority, these cases hold that an expert must provide "specific facts," even where certain "underlying facts" need not be provided. Rule 705 of the Federal Rules of Evidence cannot alter the "specific facts" requirement of Rule 56(e). *See Slaughter*, 919 F.2d at 307 n.4; *Evers*, 770 F.2d at 986.

antitrust and other forms of litigation heavily dependent on expert opinion. It is essential for this Court to establish a clear and uniform standard in this area.

B. Dr. Blair's Affidavit Did Not Rely on Facts of a Type Reasonably Relied upon by Economic Experts

In any event, the en banc majority failed to address the central deficiency of Dr. Blair's affidavit: its failure to rely on facts of a type reasonably relied upon by economic experts. Summary judgment cannot be avoided by reliance on an expert economist's affidavit which is premised on economic analysis that is without acceptance in the economic community. Thus, general acceptance of the hypotheses and methodology upon which an expert bases his or her opinion is required for an expert's opinion to be considered probative evidence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986). As a result, a number of courts have held that an expert is required to support his opinions by reliance upon facts of the type reasonably relied on by experts in the particular field.. *See* Fed. R. Evid. 703; *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1110 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992); *Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 311 (5th Cir. 1990); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987); *American Key Corp.*, 762 F.2d at 1579-80; *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1243-44, 1248-49 (E.D. N.Y. 1985),[9] *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *United States v. Metzger*, 778 F.2d 1195, 1203 (6th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986); *Merit Motors*, 569 F.2d at 673; *United States v. Alex-*

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[9] *In re "Agent Orange"* contains a comprehensive discussion, by Chief Judge Weinstein, of the case law interpreting the requirements of Rule 703 of the Federal Rules of Evidence.

ander, 526 F.2d 161, 163 (8th Cir. 1975); *see also Matsushita*, 475 U.S. at 594 n.19; *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 494 (3d Cir.) (en banc), *cert. denied*, 113 U.S. 196 (1992).[10] Indeed, this Court is currently considering the issue in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1129-30 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 320 (1992).[11]

In order to support his opinion that PVHME monopolized the DME market, Dr. Blair was required to define a relevant geographic market for DME, and to establish that PVHME had monopoly power in that market. However, in this case, there can be no doubt that the facts relied upon, and the methodology applied by Dr. Blair to support his opinions, are not "of a type reasonably relied upon by experts" in the field of economics either to define a relevant geographic market, or to conclude that Petitioner PVHME had monopoly power within that market.

1. *Respondent's Expert, Dr. Blair, Did Not Apply an Acceptable Market Definition Methodology*

Dr. Blair opined, in conclusory terms, that he found the relevant geographic market for DME to be Mason County, West Virginia. Yet, there is no valid or supportable basis in Dr. Blair's affidavit upon which an economic expert could properly opine that Mason County is the

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[10] Some cases treat the issue as one of the admissibility of the affidavit, while others focus on the sufficiency of the affidavit to defeat summary judgment. In either case, the issue is essentially the same: whether the facts relied on by the expert are of the type generally relied upon by experts in the field.

[11] Petitioners prominently cited both *Christophersen* and *Daubert* as authority in their Suggestion for Rehearing En Banc, but neither case was discussed by the Court of Appeals (en banc) in its opinion. *See* Appendix A at 1a.

relevant geographic market for DME.[12] In his affidavit, Dr. Blair stated that he had examined the customer origin data of only one single DME supplier (out of the five located in Mason County, and the additional five located in two contiguous counties—i.e., Gallia and Meigs County, Ohio).[13] Dr. Blair's affidavit does not claim to have reviewed data regarding the number and location of customers of any of the other potentially competing DME companies either outside, or inside, Mason County. Clearly, the geographic area in which a single market participant operates cannot define the geographic market. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991). Nor does Dr. Blair explain why customers presently obtaining DME supplies within Mason County could not, or would not, obtain services from companies located outside Mason County, if prices increased above competitive levels and/or quality or output decreased below competitive levels.

Dr. Blair's market analysis implicitly attempts to employ the, so called, Elzinga-Hogarty test (the "Test"), a commonly used economic methodology which defines the relevant geographic market for antitrust purposes by analyzing "shipment," or "patient origin data," and calculating the extent of the "leakage," or "overlap" into the proposed geographic market area from outside the market and out of the proposed market area from inside. Elzinga & Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 Antitrust Bull. 45, 66 (1973); Elzinga & Hogarty, *The Problem of Geographic Market Delineation Revisited: the Case of Coal*,

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[12] Dr. Blair's opinion that Mason County is also the relevant geographic market for hospital services—which is essential to Respondent's monopoly leveraging claim—is subject to the same methodological deficiencies.

[13] Because Dr. Blair did not analyze any evidence from competitors, he did not, and, indeed, could not make any estimate of market share.

23 Antitrust Bull. 1 (1978); *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1266-73 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 111 S. Ct. 295 (1990) (discussion of Elzinga-Hogarty test); *In re Adventist Health Sys./West*, FTC Docket No. 9234 (Dec. 9, 1992) (Initial Decision); *In re Coca-Cola Bottling Co.*, FTC Docket No. 9215 (June 14, 1991) (Initial Decision); *In re Coca-Cola Co.*, FTC Docket No. 9207 (Nov. 30, 1990) (Initial Decision); *In re Random House, Inc.*, FTC Docket No. 9222 (Dec. 20, 1988) (Complaint); *In re Occidental Petroleum Corp.*, FTC Docket No. 9205 (Sept. 30, 1988); *In re Olin Corp.*, FTC Docket No. 9196 (Dec. 17, 1987); *In re Hospital Corp. of Am.*, 106 F.T.C. 361 (1985) (Final Order); *In re General Foods Corp.*, 103 F.T.C. 204 (1984) (Dismissal Order); *In re Dairymen, Inc.*, 102 F.T.C. 1151 (1983) (Dismissal Order); *In re Ash Grove Cement Co.*, 85 F.T.C. 1123 (1975) (Decision).

The Test calculates two measures of market leakage: "Little In From Outside" ("LIFO"), and "Little Out From Inside" ("LOFI"). According to the Test, when there is more than 25% "leakage" under both measures, economists generally reject the proposed geographic area as too small to be even a "weak" geographic market. *Rockford*, 717 F. Supp. at 1266-73; *In re Adventist Health*, at 12-15. Yet, in this case, there was no way for Dr. Blair plausibly to assess the DME "leakage" in or out of Mason County given his concession that he examined the customer origin data of only one single supplier, out of the five located in Mason County and the five more located in the two contiguous counties. Thus, Dr. Blair did not, and, indeed, could not assert that the leakage, or overlap, both into and out of his proposed geographic market area was less than 25%. Indeed, Dr. Blair's affidavit did not, and could not discuss the degree of leakage out of, or into, his proposed market at all. Because the affidavit does not suggest any other scientifically sound basis for Dr. Blair's opinion that the

geographic market is limited to Mason County, the affidavit is insufficient as a matter of law.

2. *Dr. Blair's Affidavit Failed to Establish the Existence of Monopoly Power*

Even if Dr. Blair's affidavit could support his opinion that the relevant geographic market for DME was Mason County, which it cannot, there is no economically sound basis for Dr. Blair's opinion that PVHME is exercising "monopoly power" in the DME market in that geographic area.[14] The existence of market power ordinarily "is inferred from the seller's possession of a predominant share of the market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2081 (1992) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17 (1984)). Of course, monopoly power requires something greater than market power. *Eastman Kodak*, 112 S. Ct. at 2090. Thus, in *Eastman Kodak* this Court found that defendant's control of more than 80% of the relevant market with no readily available substitutes was sufficient evidence of monopoly power to withstand a motion for summary judgment. *Id.* at 2090. In contrast, Dr. Blair provided no calculation of the market share controlled by PVHME within the Mason County market which he asserts. Indeed, Dr. Blair could not have provided any opinion on market share because he examined the customer origin data of only one of the five DME dealers within Mason County.

Instead, to establish sufficient evidence of PVHME's monopoly power, Dr. Blair merely asserted in general terms, and without factual support, that PVHME has been able to hold "its prices above those charged by M & M on numerous articles of DME for over a year without losing significant numbers of customer[s]." Of

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[14] Dr. Blair offered no opinion with respect to PVH's monopoly power in the market for hospital services. Such an opinion would be an essential element in Respondent's monopoly leveraging claim.

course, "the relevant inquiry is not whether prices have increased, but whether they have increased over the competitive level." *Drs. Steuer & Latham, P.A. v. National Medical Enters., Inc.*, 672 F. Supp. 1489, 1502 (D.S.C. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988).[15] Plainly, Dr. Blair's conclusory assertion was insufficient to create a triable issue of fact with regard to the existence of PVHME's monopoly power in any geographic market. The mere fact that PVHME may be able to profitably charge more than Respondent for certain items or services does not establish that PVHME's prices are higher than competitive levels. Indeed, Dr. Blair's affidavit does not even say whether PVHME's prices were uniformly higher, and, if not, whether PVHME's prices were comparable with regard to a significant volume of sales and/or rentals. Dr. Blair's affidavit also fails to state whether there were differences in the services provided by the two suppliers.[16]

In contrast to Dr. Blair's general assertions, Petitioners' expert, David Eisenstadt, Ph.D., performed a study which established that Petitioners' prices were not higher than Respondent's prices. Dr. Eisenstadt's affidavit was filed with Defendants' Response to Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. In the face of the factually specific analysis provided, Dr. Blair's unsupported and unsupportable opinion was legally insufficient to avoid summary judgment. *See Matsushita*, 475 U.S. at 594; *Town Sound*, 959 F.2d at 494.

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[15] As previously stated, monopoly power is something greater than market power. Market power, in turn, is defined as the power to profitably raise prices above competitive levels. *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984); *Jefferson Parish*, 466 U.S. at 27 n.46; *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus.*, 889 F.2d 524, 528 n.8 (4th Cir. 1989).

[16] In addition, some cases require the expert to demonstrate that the factual data relied on is reliable or obtained from a reliable source. Clearly, Dr. Blair fails to make such a showing. *See In re "Agent Orange,"* 611 F. Supp. at 1243-46; *American Key*, 762 F.2d at 1580; *Slaughter*, 919 F.2d at 306-7.

Significantly, Dr. Blair did not, and, clearly, could not opine that PVHME charged monoply prices. There are three other DME dealers within Mason County, and Dr. Blair's affidavit leaves open the possibility that all of them were charging more than either Respondent or PVHME. Dr. Blair's affidavit did not, and, indeed, could not say.

C. It Is Critical to Require Rigorous Standards for Expert Affidavits in Antitrust Cases

The requirements of market definition and monopoly power are not merely ritualistic talismans requiring the incantation of magic words by a plaintiff's expert economist in order to withstand a motion for summary judgment. Rather, these requirements are imposed to ensure that a plaintiff's economic expert can demonstrate a sufficient likelihood of harm to consumers (and not just to competitors), in order to justify an expensive, and time-consuming trial, where a plaintiff is able to prevail (and obtain treble damages and attorney's fees) simply because jurors may erroneously conclude that the goal of the antitrust laws is fairness to smaller and/or less well positioned competitors, rather than injury to consumers.[17] *See* William G. Kopit & Robert W. McCann, *Old Wine in New Bottles*, 26 Wake Forest L. Rev. 3 (1991).

Permitting a plaintiff to withstand summary judgment by offering expert economic opinions which do not have a generally accepted methodological and factual foundation, substantially and improperly increases a defendant's risk of liability. If Dr. Blair's affidavit is legally sufficient, then, for purposes of avoiding summary judgment, many suppliers could claim that their rivals have monopoly power. For instance, RCA could claim that Sony has monopoly power because some of its prices are higher; Lincoln could claim that Cadillac has monopoly power because some of its prices are higher; and Cadillac could

[17] For this reason, it is often preferable, purely as a business decision, to settle rather than run the risk of an extensive award.

claim that Mercedes has monopoly power because some of its prices are higher. Indeed, if Dr. Blair's affidavit is legally sufficient to withstand a motion for summary judgment, then plaintiffs can simply hire experts willing to opine generally that the defendant has been able to successfully charge more than a competing plaintiff for some goods and services. That is not the law.

Rule 56(e) provides that a party opposing a motion for summary judgment "may not rest upon the mere allegations . . . but . . . must set forth specific facts showing that there is a genuine issue for trial." *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 927 (4th Cir. 1990). An expert's opinions, not supported by facts and methodologies of the type generally relied upon by experts in the field, should not be permitted to eviscerate that requirement. *See* Fed. R. Evid. 703. As the Court of Appeals for the Seventh Circuit has stated, "ukase in the guise of expertise is a plague in contemporary litigation." *Mid-State Fertilizer*, 877 F.2d at 1340.

D. The Trial Judge Did Not Abuse His Discretion in Not Permitting Respodent to Supplement the Affidavit of Its Expert, Dr. Blair

This Court has held that the trial judge has broad discretion to screen and evaluate expert evidence. *Bourjaily v. United States*, 483 U.S. 171, 175, 179-80 (1987); *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962); *see Congress & Empire Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878);[18] *Christophersen*, 939 F.2d at 1109.[19]

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[18] The Federal Rules of Evidence, of course, have since expanded the use of expert testimony. However, the language of Rule 56(e) of the Federal Rules of Civil Procedure indicates that the trial judge retains the discretion not to permit experts to supplement their affidavits prior to ruling on a motion for summary judgment.

[19] Again, *Christophersen* was not discussed by the Court of Appeals (en banc), although the case was prominently cited to as authority in Petitioners' Suggestion for Rehearing En Banc. *See* Appendix A at 1a.

There is good reason for permitting the trial judge to exercise such discretion. The trial judge is in the best position to weigh all of the relevant considerations. In this case, Petitioners served Respondent with an interrogatory inquiring about its expert's opinions. On May 2, 1989, Respondent filed responses to Defendants' Combined Interrogatories and Request for Production of Documents to Plaintiff, and, in response to Interrogatory No. 2, which asked for the identification of expert witnesses and the facts and grounds for their opinions, Respondent answered that "Dr. Blair's investigation of this case has not proceeded to the point where he has prepared a statement of opinions" and further added, "M & M Medical Supplies & Services, Inc., will supplement this answer when Dr. Blair has finalized his opinions and when M & M hires additional experts." However, at the time discovery was closed, Respondent had still not supplemented its response as promised. As a result, Dr. Blair's affidavit was the first, and, indeed, the only notification of Dr. Blair's opinions ever received by Petitioners. It was not reversible error for the trial court to grant summary judgment without permitting Respondent to supplement Dr. Blair's affidavit.

II. RESPONDENT CANNOT SATISFY THIS COURT'S TEST FOR ESTABLISHING AN ATTEMPT TO MONOPOLIZE

The en banc majority's analysis of the requisite elements of an attempted monopolization claim is inconsistent with this Court's recent decision in *Spectrum Sports*.[20] 113 S. Ct. 884. The en banc majority enunciated a sliding scale for the minimum market share necessary to establish the existence of a dangerous probability of monopolization.

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[20] Dr. Blair's failure to use an acceptable economic methodology to establish that the relevant geographic market for DME is limited to Mason County should, by itself, permit summary judgment on the attempted monopolization claim as well as the monopolization claim.

Specifically, according to the standard established by the en banc majority, the quantum of evidence necessary to establish a dangerous probability of monopolization is dependent on the type and extent of the evidence provided regarding the other two required elements of an attempt to monopolize claim—i.e., a specific intent to monopolize, and exclusionary or anticompetitive acts in furtherance of that unlawful intent. The greater the evidence of unlawful intent, or of exclusionary conduct, the lower the market share standard necessary to meet the dangerous probability of monopolization requirement. As stated by the en banc majority

> [m]arket share is relevant, but its relevance is tempered by evidence of the other two elements of the claim. Compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market shares that need be shown.

Appendix A at 15a.

Of course, this Court has held repeatedly that market share is nothing more than a surrogate for market power, and that monopoly power is something more than market power. *Eastman Kodak*, 112 S. Ct. at 2081. Moreover, in *Spectrum Sports* this Court has recently held that monopoly power, or at least a dangerous probability of monopoly power, is the sine qua non of any Section 2 claim, including an attempt to monopolize claim. *See Spectrum Sports*, 113 S. Ct. at 889-92. Clearly, under *Spectrum Sports*, it is impermissible to establish a test that permits the amount of evidence required to establish a dangerous probability of monopolization to be determined by the amount of evidence regarding factors unrelated to the existence (or non-existence) of monopoly or market power. *Id.* The test for attempted monopolization enunicated by the en banc majority is in conflict with the standard established by this Court.[21] As Re-

[21] Significantly, the en banc majority does not discuss PVHME's market share in the DME market. The en banc majority also does not claim that PVHME's market share is more than the 30% the

spondent cannot establish attempted monopolization under the standard established in *Spectrum Sports*, the en banc majority decision must be reversed.

III. MONOPOLY LEVERAGING IS NOT A SEPARATE AND COGNIZABLE CAUSE OF ACTION UNDER THE ANTITRUST LAWS

The en banc majority opinion also reinstated Respondent's "monopoly leveraging" claim, at least for the purposes of trial.[22] In so doing, the en banc majority implicitly rejected this Court's recent pronouncement in *Spectrum Sports*, as well as the clear holding of two other circuits, and adopted the view that "monopoly leveraging" can be a cognizable cause of action. Appendix at 16a.

In this case, the District Court, through Chief Judge Haden, correctly concluded that there is no separate cause of action for "monopoly leveraging" where, as here, the Respondent cannot establish "a dangerous probability of monopolization." Admittedly, two circuits have held that "monopoly leveraging" is a separate and cognizable cause of action. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Kerasotes Mich. Theatres, Inc. v. National Amusement, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub nom., G.K.C. Michigan Theatres, Inc. v. National Amusements, Inc.*, 490 U.S. 1087 (1989).

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court would require, as discussed in the sliding scale test included in their opinion. The reason is obvious. Dr. Blair offered no assessment of market share at all—nor could he—given his concession that he reviewed customer origin data of only one DME company (out of the five located in Mason County and the five additional companies located in the two contiguous counties).

[22] Monopoly leveraging would depend on PVH's monopoly power in the hospital market. As previously discussed, Dr. Blair's affidavit does not use acceptable economic analysis to support his opinion that the relevant market for hospital services is limited to Mason County. For this reason alone, Respondent's "monopoly leveraging" claim should be dismissed.

However, since Judge Haden's decision, two other circuits have determined that "monopoly leveraging" is not a cognizable cause of action. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993). Petitioners submit that these more recent opinions, which were not discussed by the en banc majority, are manifestly correct, particularly when read in the light of *Spectrum Sports*.

Monopoly leveraging involves the use of monopoly power in one market to create a competitive advantage in a second market. By definition, in a "monopoly leveraging" claim there is no monopolization or attempted monopolization of the second market; otherwise there would be no need for a separate cause of action for leveraging, as opposed to monopolization, or attempted monopolization. Yet, *Spectrum Sports* clearly states that there can be no violation of Section 2 of the Sherman Act unless there is monopolization, or, at least, a dangerous probability of monopolization. *See Spectrum Sports*, 113 S. Ct. at 889-92. Here again, the en banc majority opinion is inconsistent with the decision in *Spectrum Sports*.

CONCLUSION

This Court should establish a clear standard under Rule 56(e) of the Federal Rules of Civil Procedure by which the lower courts can determine the sufficiency of expert affidavits. In addition, the guidance of this Court is essential both to establish whether "monopoly leveraging" is a cognizable Sherman Act Section 2 claim; and to reaffirm that "a dangerous probability of monopolization" is an independent element of any attempted monopolization claim under Section 2 of the Sherman Act.

The procedural and evidentiary issues involved in the present case are not parochial. They are critical, not only to antitrust litigants, but also to litigants in other areas of law heavily dependent on expert opinion.

Moreover, each of the issues herein is the object of conflicts among the Circuits and/or between the Fourth Circuit and this Court. This case is an appropriate vehicle for this Court to establish the appropriate legal standards and to clarify the controlling law.

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 90-3100

M & M MEDICAL SUPPLIES AND SERVICE, INCORPORATED,
Plaintiff-Appellant,

v.

PLEASANT VALLEY HOSPITAL, INCORPORATED; PLEASANT VALLEY HOME MEDICAL EQUIPMENT, INCORPORATED,
Defendants-Appellees.

Argued April 7, 1992

Decided Dec. 9, 1992

As Amended Jan. 20, 1992

James Allen Burt, Strong & Associates, P.C., Springfield, Mo., argued (Richard A. Bush, Bush & Trippel, Parkersburg, W.Va., on brief), for plaintiff-appellant.

John Earl Jenkins, Jr., Jenkins, Fenstermaker, Krieger, Kayes & Farrell, Huntington, W.Va., argued (Carroll W. Casto, Casto & Casto, L.C., Point Pleasant, W.Va., William G. Kopit, Epstein, Becker & Green, P.C., Washington, D.C., on brief), for defendants-appellees.

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, LUTTIG, and

WILLIAMS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

OPINION

BUTZNER, Senior Circuit Judge:

M & M Medical Supplies and Service, Inc. (M & M), a retail dealer in durable medical equipment (DME), appeals a summary judgment dismissing its antitrust action and pendent state claims against Pleasant Valley Hospital, Inc., and its subsidiary, Pleasant Valley Home Medical Equipment, Inc. (Equipment Company). M & M complains that the Hospital uses its access to patients to exclude a previously strong DME competitor from the market. The Hospital contends that M & M did not meet its burden of proving the elements of its claim.

The district court held that M & M failed to furnish sufficient proof to withstand summary judgment with respect to its claim that the Hospital and its Equipment Company monopolized and attempted to monopolize the DME market in Mason County, West Virginia, in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. Specifically, the court ruled that M & M had failed to establish the relevant market and to show that the Hospital and its Equipment Company had monopoly power or had attempted to monopolize the DME market. The district court also dismissed the claim of monopoly leveraging on the ground that it is not a distinct claim under the Sherman Act. It summarily dismissed pendent state claims. *M & M Medical Supplies & Service, Inc. v. Pleasant Valley Hospital, Inc.*, 738 F.Supp. 1017 (S.D. W.Va.1990).

A panel of this court, one judge dissenting, vacated the summary judgment entered in favor of the Hospital and its Equipment Company. 946 F.2d 886. The court then reheard the appeal en banc. Guided in part by recent decisions that were not available to the district

court, we again vacate the district court's judgment and remand the case for further procedeings.

I

Since approximately 1980, M & M has sold and rented DME to patients receiving medical care and treatment. DME is a category of medical goods that includes beds, wheelchairs, walkers, and oxygen equipment. M & M is located in Point Pleasant, West Virginia, one of four DME dealers in that community. The Hospital is a 128-bed, acute-care hospital also located in Point Pleasant. It is the only acute-care hospital in Mason County and draws approximately 65% of its patients from Mason County. The rest of the patients are drawn largely from Gallia and Meigs Counties, Ohio. Both of these Ohio counties have acute-care hospitals, and some Mason County patients use them.

Late in 1985, the Hospital found itself faced with flagging revenues because of cutbacks ordered in the rates of Medicare and Medicaid reimbursement. In response, the Hospital decided to enter the DME business as a means of bolstering its profitability. The Hospital first attempted to purchase M & M, but the parties could not come to terms. In November 1985, the Hospital opened a wholly owned subsidiary, the Equipment Company. After the founding of the Equipment Company, the gross revenues of M & M fell by more than 75%.

II

Federal Rule of Civil Procedure 56 requires the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for

discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). However, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A motion for summary judgment may not be defeated by evidence that is "merely colorable" or "is not sufficiently probative." *Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2510-11. Summary judgment is inappropriate "even where there is no dispute as to the evidentiary facts but only as to the conclusions to be drawn therefrom." *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979) (quoting *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.1951)). However, respondents must show that the inferences they suggest are "reasonable in light of the competing inferences. . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Like any other nonmoving party that will bear the burden of proof at trial, M & M is entitled

> to have the credibility of [its] evidence as forecast assumed, [its] version of all that is in dispute accepted, all internal conflicts in it resolved favorably to [it], the most favorable of possible alternative inferences from it drawn in [its] behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered.

Charbonnages, 597 F.2d at 414. The appellate standard for review of a summary judgment is *de novo*. *Medical Waste Assocs. v. Mayor and City Council of Baltimore*, 966 F.2d 148, 150 (4th Cir.1992).

We reject M & M's argument that the district court improperly allocated the burden of production under Fed.R.Civ.P. 56. The rule "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e)). By requiring M & M to establish that triable issues existed as to every element of its claims, the district court properly applied the doctrine of *Celotex*.

M & M also assigns error to the district court's entry of a protective order under Fed.R.Civ.P. 26(c) barring it from contacting former patients of the hospital whose identity it learned through discovery. The district court acted after the Hospital complained that M & M was harassing its former patients.

An order under rule 26(c) is committed to the discretion of the trial court and will not be disturbed on appeal unless the court has abused its discretion. *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.1977). Abuse may be demonstrated by a clear showing that denial of discovery has caused substantial prejudice. *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 744 (7th Cir.1985). Inasmuch as M & M obtained critical evidence from some patients before the ban on discovery, it was not substantially prejudiced. Consequently, at this stage of the proceedings, we find no cause for reversal in the district court's ruling, leaving to the court on remand how to accommodate the interests of the parties and the patients within the dictates of rule 26(c) as circumstances develop.

III

In order to withstand the entry of summary judgment, M & M had to establish that the Hospital and its Equipment Company possessed monopoly power in the rele-

vant market and that they willfully acquired or maintained "that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). M & M claims the relevant market is Mason County, West Virginia. The Hospital claims that in addition to Mason County the relevant market includes Gallia and Meigs Counties, Ohio, which are linked by bridges spanning the Ohio River.

The district court held that M & M's evidence was insufficient to show the possession of monopoly power in the relevant market. The district court then found no need to address willful acquisition or maintenance of monopoly power. It reached this result by refusing to consider the affidavit of M & M's expert, Dr. Roger D. Blair because, in the court's view, the affidavit did not set forth specific facts. *See M & M Medical*, 738 F.Supp. at 1020.

In his affidavit, Dr. Blair stated:

> For purposes of the affidavit, I have reviewed the Complaint and the material produced by Pleasant Valley Home Medical Equipment identifying the origin of their patients as well as patient origin data for Pleasant Valley Hospital. I have interviewed Michael Marnhout and other M & M Medical Supplies personnel. I have visited Point Pleasant, West Virginia and personally identified all companies relevant to this case. I have made price comparisons for articles of durable Valley Home Medical Equipment and M & M Supplies and Services.
>
> * * * *
>
> The relevant geographic market for hospital services and durable medical equipment in this case is Mason County, West Virginia. The patient origin data strongly suggest that Mason County residents rely

> predominantly upon Mason County suppliers for their hospital and medical equipment needs. Some overlap into the neighboring Ohio counties is to be expected but does not change the unmistakable conclusion that Mason County represents a distinct geographic market for antitrust analysis.
>
> Pleasant Valley Home Medical Equipment is exercising monopoly power—i.e., the power to raise price or exclude competition. Pleasant Valley Home Medical Equipment has held its prices above those charged by M & M Supplies and Services on numerous articles of DME for over a year without losing significant numbers of customer[s]. This is a direct measure of monopoly power.

Affidavits submitted to support or oppose a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R.Civ.P. 56(e). Affidavits submitted in opposition to a motion for summary judgment "made and supported as provided in this rule . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R. Civ.P. 56(e).

Dr. Blair's qualifications are not questioned. His affidavit satisfies the rule. He recited his basis for personal knowledge: a review of the data showing the patient origin for the Hospital and the Equipment Company, interviews with M & M personnel, visits to Point Pleasant and identification of the relevant companies, and his price comparisons for DME offered by the Equipment Company and M & M.

Dr. Blair's affidavit was far more than a conclusory statement based on general antitrust theory. He cited the facts that supported his conclusion concerning the relevant market and the exercise of monopoly power. The

facts were patient origin and price comparison. His report that the Equipment Company had been holding its prices above M & M's for over a year without losing a significant number of customers was stated as a fact. Based on these facts, Dr. Blair explained his reasoning concerning the relevant market and monopoly power.

What Dr. Blair omitted from his affidavit were not facts or reasons but rather the underlying data supporting his facts—the addresses of the Hospital patients and the prices of both DME companies. Federal Rule of Civil Procedure 56(e) does not mandate exclusion of an affidavit for lack of the underlying data supporting an affiant's assertion of fact. Instead the rule provides for supplementation of affidavits by depositions, answers to interrogatories, or further affidavits. In this manner underlying data can be obtained if needed for evaluation of the expert's opinion.

The district court held that Federal Rule of Evidence 705, which allows an expert to give his opinion without prior disclosure of the underlying facts, does not alter the requirement of Fed.R.Civ.P. 56(e) that affidavits submitted in summary judgment proceedings set forth specific facts.

The district court's observation is correct. An expert's affidavit that is wholly conclusory and devoid of reasoning does not comply with Fed.R.Civ.P. 56(e). *Military Services Realty, Inc. v. Realty Consultants of Virginia, Ltd.*, 823 F.2d 829, 832 (4th Cir.1987). The deficiencies in such an affidavit are not remedied by resort to the Federal Rules of Evidence. *See Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir.1989); *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir.1985); *United States v. Various Slot Machines*, 658 F.2d 697, 699-701 (9th Cir.1981); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C.Cir.1977).

But the primacy of Fed.R.Civ.P. 56(e) does not exclude all applications of the Federal Rules of Evidence pertaining to an expert's opinion in summary judgment proceedings. In view of Fed.R.Evid. 1101(b), which makes the Federal Rules of Evidence apply generally to all civil actions, Fed. R.Evid. 705 and Fed.R.Civ.P. 56 (e) must be reconciled. Federal Rule of Evidence 705 permits an expert to give reasons for an opinion "without prior disclosure of the underlying facts or data unless the court requires otherwise." As previously noted, we believe that Fed.R.Civ.P. 56(e) trumps this rule of evidence with respect to the disclosure of facts in a summary judgment proceeding. Nevertheless, Fed.R.Civ.P. 56(e) and Fed.R.Evid. 705 can be reconciled with respect to data supporting the facts. Neither rule requires prior disclosure of the supporting data—in this case patients' addresses and DME prices. Furthermore, both rules contemplate supplementation of the expert's affidavit to disclose supporting data if the court deems the disclosure to be necessary before it decides the motion for summary judgment.

In cases comparable to the one before us, appellate courts have reversed summary judgments that were based on the exclusion of experts' affidavits because of the mistaken belief that they failed to contain specific facts. In *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316-18 (9th Cir.1985), the court drew a distinction between a wholly conclusory affidavit and an affidavit stating facts but lacking detail. Adverting to the proper accommodation between Fed.R.Civ.P. 56(e) and Fed.R.Evid. 705, the court held that if further information was necessary the district court should require it to be disclosed instead of excluding the affidavit. To the same effect is *Monks v. General Electric Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990), in which the court in dicta referred to Fed.R.Civ. 705 to preserve an affidavit that the district court believed to be deficient because it lacked extensive detail. The court in *Ambrosini v. Laborraque*, 966 F.2d 1464, 1470-

71 (D.C.Cir.1992), reversed a grant of summary judgment because the district court erred in holding an expert's affidavit to be deficient. The court of appeals noted that the affidavit stated a fact as the basis of the expert's opinion. While recognizing the distinction between Fed. R.Civ.P. 56(e) and Fed.R.Evid. 705, it concluded that without further inquiry into the factual basis of the opinion, summary judgment was premature.

We reject M & M's argument that Fed.R.Evid. 705 permits deferral of disclosure of Dr. Blair's data until trial. Neither Fed.R.Civ.P. 56(e) nor Fed.R.Evid. 705 places any limitation on a court's authority to require an expert to disclose supporting data in any pretrial proceeding, including one for summary judgment.

In sum, we reiterate that an expert's conclusory affidavit lacking facts does not satisfy the requirements of Fed.R.Civ.P. 56(e). In contrast, an affidavit that states facts on which the expert bases an opinion satisfies Fed. R.Civ.P. 56(e) even though the expert does not attach the data supporting the facts. If need be, the court, acting pursuant to Fed.R.Civ.P. 56(e) and Fed.R.Evid. 705, can require the expert to furnish the supporting data. Applying these precepts, we conclude that the district court should not have granted summary judgment dismissing the monopoly claim on the ground that Dr. Blair's affidavit was inadequate.

IV

M & M's attempted monopolization claim is based on section 2 of the Sherman Act which forbids an attempt to monopolize as well as monopolization. An attempt to monopolize employs "methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it." *American Tobacco Co. v. United States,* 328 U.S. 781, 785, 66 S.Ct. 1125, 1127, 90 L.Ed. 1575 (1946); *see also Swift & Co. v. United States,* 196 U.S. 375, 396, 25 S.Ct. 276,

279, 49 L.Ed. 518 (1905) (the seminal case). Courts analyze this offense as having three elements: (1) a specific intent to monopolize the relevant market; (2) predatory or anticompetitive acts in furtherance of the intent; and (3) a dangerous probability of success. *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 926 (4th Cir. 1990); *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139, 147 (4th Cir.1990).

Specific intent may be inferred from the defendant's anticompetitive practices. *See Abcor*, 916 F.2d at 927; *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 802 (8th Cir.1987); *see also* 2 Earl W. Kintner, *Federal Antitrust Law* § 11.9, at 318 & nn. 189-90 (1980). It is therefore logical to begin by analyzing the record to see whether it establishes anticompetitive acts by the defendant. The district court held that M & M's proof was insufficient because "the evidence of record does not indicate that the patients were coerced or forced in any way to satisfy their DME needs through the Equipment Company to the exclusion of all of its competitors" and "[t]here is nothing [in the record] to suggest that the patients were threatened or would have been subject to adverse action if they had chosen another DME supplier." *M & M Medical*, 738 F.Supp. at 1021.

The district court's formulation misstates the standard for anticompetitive conduct. "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S.Ct. 2847, 2859, 86 L.Ed.2d 467 (1985) (quoting Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 138 (1978)). "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended." *Aspen Skiing*, 472 U.S. at 603, 105 S.Ct. at 2857 (quoting Bork, *The Antitrust Paradox* 160).

In a case that also charges hospital-DME monopolization, we held recently that

> if the plaintiff can prove that the DME now provided to patients in the relevant areas is inferior in quality and/or more expensive than [the plaintiff's], it will have shown harm to competitors, short-term sacrifices by the hospitals, and adverse effects on merits competition that injure DME consumers, all as a result of the hospitals' entry into the DME markets. From this a finder of fact may be able to infer that their motives were anticompetitive (i.e., that there were predatory acts stemming from an illegal specific intent to monopolize).

Advanced Health-Care, 910 F.2d at 148. In that case, we applied *Aspen Skiing* to the alleged exclusionary conduct of a hospital and its favored DME supplier and held that the conduct supported an inference that the hospital deliberately discouraged its customers from dealing with DME dealers other than the one affiliated with the hospital. The allegations supporting this inference, we held, stated a claim for attempted monopolization. *Advanced Health-Care,* 910 F.2d at 149 (citing *Aspen Skiing,* 472 U.S. at 610, 105 S.Ct. at 2861).

Viewed in the proper light for summary judgment, this record discloses in affidavits made by former patients and staff that after the founding of the Equipment Company, a memorandum had been sent to physicians practicing at the Hospital suggesting that they refer all their patients to the Equipment Company for their DME needs. A medical staff assistant to one physician confronted a Hospital official about the memo and about patients' complaints about the Hospital's DME referral policy. The official at first denied, then confirmed, the existence of the memo and threatened the staff member with legal action because of her complaint. Hospital employees told a patient's granddaughter who wished to order a bed from M & M that only the Equipment Company could supply the proper equipment for her grandfather. One former Hospital physician was pressured by the Hospital to cease

her practice of referring patients to an outside company as a rental source for in-hospital infant monitors that would later be taken home with babies requiring monitoring. When she continued to make such referrals, the Hospital changed its regulations to forbid in-hospital use of infant monitors supplied by vendors other than the Hospital's Equipment Company. One former Hospital employee whose husband rented DME from M & M for his own medical needs received a mailed solicitation to switch to the Equipment Company and a visit from a Hospital worker who told her that she should switch companies because she was a Hospital employee. This employee reported that "We found [M & M's] service to be excellent. I felt it unfair that the hospital would use my husband's medical records to obtain information to get business. I also feel it was unfair to have been placed in the position to change my husband to the Hospital's equipment company, because I was an employee."

Perhaps most significant are five affidavits which state that the Hospital ordered DME from the Equipment Company without consulting the patients or telling them they had a choice of DME supplier. In one instance, the Equipment Company delivered oxygen equipment to the patient's home, although the Hospital had made no mention of the need for the equipment, let alone alternative suppliers. More frequently the Hospital employees or staff simply informed the patient that they would provide needed DME without mentioning that they would order it only from the Equipment Company or that alternative suppliers were available. Some of the patients stated in their affidavits that had they been given a choice, they would have purchased the DME from M & M.

This evidence, like that in *Aspen Skiing,* "supports an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing,* 472 U.S. at 610-11, 105 S.Ct. at 2861.

The Hospital protests that *Aspen Skiing* is inapplicable because in that case the defendant's conduct harmed it as well as the plaintiff. This self-induced injury, the Hospital argues, was critical to the Court's decision because it was proof of "a deliberate effort to discourage its customers from doing business with its smaller rival." *Aspen Skiing*, 472 U.S. at 610, 105 S.Ct. at 2861.

The record in this case discloses self-induced injury on the part of the Hospital and its Equipment Company no less significant for summary judgment purposes than that in *Aspen Skiing*. When the Equipment Company commenced business, it deliberately set DME prices below those of its competing suppliers. While the Equipment Company sought to justify the initial low prices, familiar rules governing summary judgment proceedings entitle M & M, the nonmoving party, to the inference that this was an anticompetitive step toward attempted monopoly.

The record discloses that the Equipment Company took a second anticompetitive step. In due course it charged more than M & M for many items of DME. Nevertheless, it did not lose significant numbers of customers. Such anticompetitive pricing could be maintained, it may be inferred, by the Hospital's practice of ordering DME from the Equipment Company without consulting with its patients.

At this stage of the proceedings, it is fair to infer that the Hospital's restrictive DME practices enabled the Equipment Company to retain customers despite the higher prices it charged after its initial low pricing policy. M & M, responding to a motion for summary judgment, is entitled to the inference that the scheme, as depicted in affidavits before the district court, was an anticompetitive one, manifesting an attempt by the Hospital and its Equipment Company to monopolize the DME market. *See* 2 Earl W. Kintner, *Federal Antitrust Law* § 12.9, at 359-60 (1980).

The third element of attempted monopolization, a dangerous probability of success, must be shown to be substantial and real. Market share is relevant, but its relevance is tempered by evidence of the other two elements of the claim. Compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown. Conversely, weak evidence of the other two elements requires a showing of significant market share. A rising share may show more probability of success than a falling share. Other factors must be considered, such as ease of entry, which heralds slight chance of success, or exclusionary conduct without the justification of efficiency, which enhances the likelihood of success. *See generally* 3 Philip Areeda & Donald F. Turner, *Antitrust Law* ¶ 835, at 346-48 (1978) (Areeda & Turner). For example, in *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir.1974), a stable nine percent market share with no conduct to enlarge the share showed no dangerous probability of achieving monopoly power. In contrast, allegation of a dominant market share coupled with exclusionary conduct withstood a motion to dismiss for failure to state a claim. *See Advanced Health-Care,* 910 F.2d at 147-49.

In this case the Hospital and the Equipment Company presented evidence that sharply contested M & M's claim of attempted monopolization. Consequently, the showing of market share that M & M will need to establish depends in part on its proof of the other two elements. While the market share necessary to show an attempt to monopolize is difficult to quantify, a leading text has offered a general scale that a court may cautiously apply taking into consideration the proof offered for the other two elements: (1) claims of less than 30% market shares should presumptively be rejected; (2) claims involving between 30% and 50% shares should usually be rejected, except when conduct is very likely to achieve

monopoly or when conduct is invidious, but not so much so as to make the defendant per se liable; (3) claims involving greater than 50% share should be treated as attempts at monopolization when the other elements for attempted monopolization are also satisfied. *See* 3 Areeda & Turner ¶ 835c, at 350.

Applying these principles, we conclude that patient's descriptions of exclusionary anticompetitive conduct, the affidavits of a doctor and of a former employee recounting pressures applied by the Hospital, M & M's substantial decrease in revenue, and Dr. Blair's affidavit adequately address the three elements of attempted monopolization. M & M's proof discloses genuine issues of material fact sufficient to withstand the motion for summary judgment.

V

M & M also alleged a violation of the Sherman Act by "monopoly leveraging"—" 'the use of [monopoly] power [in one market], however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor' in another distinct market." *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 681 (2d Cir.1985) (quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir.1979)). The district court held that this claim was not cognizable under the Sherman Act. *M & M Medical*, 738 F.Supp. at 1021.

In *Advanced Health-Care*, 910 F.2d at 149-50 & n. 17, we reversed the dismissal of a leveraging claim, while expressly reserving judgment until the advent of "a case in which the issue is squarely presented." Again, we express no opinion on this question but assume for purposes of remand that monopoly leveraging is a separate violation of section 2. There will be time enough to evaluate the validity of this assumption after the parties have developed a factual record.

VI

Because the district court improperly excluded M&M's expert's affidavit in consideration of its monopolization and attempted monopolization claims, and because it decided the specific intent and predatory conduct issues under an erroneous legal standard, we vacate the grant of summary judgment as to those counts. Inasmuch as the law in this circuit does not clearly establish whether monopoly leveraging is a cognizable claim under § 2, we vacate the grant of summary judgment on that count as well. The reinstatement of the § 2 claims restores federal jurisdiction; for this reason, we vacate the dismissal of M & M's pendent state-law claims. The case is remanded to the district court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

K.K. HALL, Circuit Judge, dissenting:

Because I continue to believe that M&M Medical Supplies has failed to carry its burden in opposition to the hospital's motion for summary judgment, I respectfully dissent.

The first element of a claim of monopolization under § 2 of the Sherman Act is "market power." In order to prove the exercise of market power, a plaintiff must show (1) the existence of some specific, defined geographic market for the product, i.e., the "relevant market," and (2) the exercise of monopoly power by the defendants in that market. *Satellite Television & Associates Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir.1983), *cert. denied*, 465 U.S. 1027, 104 S.Ct. 1285, 79 L.Ed.2d 688 (1984). If the plaintiff fails to prove either of the elements of market power, its entire claim must be dismissed. *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495-96 (4th Cir.1986), *cert. denied*, 481 U.S. 1050, 107 S.Ct. 2182, 95 L.Ed.2d 838 (1987); *Satellite Television*, 714 F.2d at 357.

In opposition to the motion for summary judgment, M & M submitted an affidavit by Dr. Blair alleging that, based upon his personal investigation and review of the materials produced by Pleasant Valley, the relevant geographic market for durable medical equipment is Mason County, West Virginia. Although Dr. Blair's affidavit recites the materials he reviewed to reach this conclusion, it fails to cite any of the specific facts that he believes demonstrate that Mason County is the relevant geographic market for durable medical equipment.

As the majority states, several cases have recently held that the proper remedy for an expert's affidavit that fails to disclose the facts supporting its conclusion is supplementation rather than exclusion. *See Ambrosini v. Labarraque*, 966 F.2d 1464 (D.C.Cir.1992); *Monks v. General Elec. Co.*, 919 F.2d 1189 (6th Cir.1990); *Bulthuis v. Rexall Corp.*, 789 F.2d 1315 (9th Cir.1985). However, I believe that we should adopt the rule of the Eleventh Circuit: An expert's affidavit submitted in opposition to a motion for summary judgment must set forth specific facts to support its conclusions. *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985); *see also Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307 n. 4 (5th Cir.1990). Therefore, I believe that the district court properly refused to consider a conclusory affidavit that furnished no specific facts in opposition to Pleasant Valley's motion for summary judgment.

Even if I were to find that the district court erred in excluding Dr. Blair's affidavit, I would still hold that M & M failed to define the relevant market. The relevant geographic market is the area in which the suppliers of *durable medical equipment* effectively compete and to which their customers could practicably turn for alternative sources of such products. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 331-32, 81 S.Ct. 623, 630, 5 L.Ed.2d 580 (1961); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir.

1991). Dr. Blair clearly failed to differentiate the market for hospital services, which is not at issue, from the market for durable medical equipment. For example, Dr. Blair reviewed "the patient origin data for Pleasant Valley Hospital" and determined:

> The relevant geographic market for hospital services and durable medical equipment in this case is Mason County, West Virginia. The patient origin data strongly suggest that Mason County residents rely predominantly upon Mason County suppliers for their hospital and medical equipment needs. . . .

See *supra* at pp. 163-64. If M & M had chosen to assert a "tie-in" claim, i.e., that Pleasant Valley Hospital was using its hospital services market share to force its customers to purchase durable medical equipment from Pleasant Valley Home Medical Equipment, the patient origin data for hospital services would be relevant. However, M & M has not asserted a tie-in claim and, therefore, it was wrong for Dr. Blair to rely upon the patient origin data for hospital services in order to determine the geographic market for durable medical equipment.

Assuming, for the purposes of summary judgment, that Dr. Blair relied solely upon the patient origin data from Pleasant Valley Home Medical Equipment in order to determine the relevant market for durable medical equipment, I would still be troubled. Dr. Blair's affidavit assumes, without offering any evidence to support his assumption, that the relevant market for durable medical equipment may be defined by the residences of the customers of Pleasant Valley Home Medical Equipment. Of course, the area in which a market participant operates does not define the market itself. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d at 1490 ("[A] company may compete in many markets or in only part of a market. Where it competes does not define the market.").

Finally, although Dr. Blair concedes that the market for durable medical equipment overlaps into the neighboring Ohio counties, he offers no facts to demonstrate how much overlap exists (in absolute or relative terms). For example, 35% of Pleasant Valley Hospital's customers are not from Mason County. Assuming *arguendo* that the market for hospital services may be used to define the market for durable medical equipment, Dr. Blair does not even address why this substantial overlap into neighboring counties does not destroy his theory that Mason County alone is the relevant market.

In short, the plaintiff failed to show the existence of a specific, defined geographic market and, therefore, summary judgment was properly entered against M & M.

M & M's claim for attempted monopolization also requires that it establish the relevant geographic market that Pleasant Valley is allegedly attempting to monopolize. Because M & M has failed to establish the relevant market this claim also must fail.

I would affirm the district court's grant of summary judgment. I am authorized to state that Circuit Judge DONALD RUSSELL, Circuit Judge WIDENER, Circuit Judge WILKINSON, and Circuit Judge NIEMEYER join in this opinion.

LUTTIG, Circuit Judge, dissenting:

I believe that the district court properly granted summary judgment on M & M's monopolization and attempted monopolization claims under section 2 of the Sherman Act, and accordingly I dissent. I would hold, even if M & M's expert affidavit established a genuine issue of material fact as to the Hospital's monopoly power in the relevant market, that M & M failed to produce evidence that Pleasant Valley Hospital or its subsidiary, Pleasant Valley Home Medical Equipment, willfully acquired or maintained monopoly power, evidence that is

essential to M & M's monopolization claim. I would also hold, as did the district court, that M & M failed to produce evidence of a specific intent by Pleasant Valley to monopolize, evidence that is essential to its attempted monopolization claim.

I.

A section 2 claim for monopolization requires proof of "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); *accord, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, —— U.S. ——, ——, 112 S.Ct. 2072, 2089, 119 L.Ed.2d 265 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n. 19, 105 S.Ct. 2847, 2854 n. 19, 86 L.Ed.2d 467 (1985). If " 'valid business reasons' " exist for a company's actions, the company cannot be liable for the willful acquisition or maintenance of monopoly power. *Kodak*, —— U.S. at ——, 112 S.Ct. at 2091 (quoting *Aspen Skiing*, 472 U.S. at 605, 105 S.Ct. at 2858). In fact, this court has held that "[t]o satisfy the . . . element [of] willful acquisition or maintenance of [monopoly] power," a monopolization plaintiff "must show that a jury could find no valid business reason or concern for efficiency" in the defendant's conduct. *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 105 (4th Cir.1987) (Butzner, J.); *accord Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 710 (4th Cir.1991) (*en banc*).

In my view, M & M did not proffer sufficient evidence on the Hospital's alleged willful acquisition or maintenance of monopoly power to entitle it to proceed to trial on its monopolization claim.[1] M & M's proffer shows that

[1] The majority does not address whether M & M proffered sufficient evidence to withstand summary judgment on its monopoliza-

the Hospital referred patients with DME needs to Pleasant Valley Home Medical Equipment [the Equipment Company] instead of to third-party DME providers and that it did not, as a matter of course, inform patients of the existence of third-party DME providers. As the district court noted, M & M proffered neither evidence that "patients were advised they could not go elsewhere for DME" nor any evidence of "coercion." 738 F.Supp. at 1021-22. Nor is there any evidence that the Equipment Company's competitors were foreclosed from soliciting purchases from the Hospital's patients. The referral of patients to the Equipment Company without mention of its competitors is entirely lawful, nonpredatory activity which served the Hospital's valid business interest in supporting its subsidiary rather than its subsidiary's competitors. The Hospital was not obliged under the antitrust laws either to refer its patients to competitors or to inform its patients about third-party DME providers. *See, e.g., Aspen Skiing*, 472 U.S. a 600, 105 S.Ct. at 2856 ("[E]ven a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor."); *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281-84 (2d Cir. 1979).

M & M failed to produce any other evidence inconsistent with the conduct of lawful competitive market activity.

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tion claim; it holds only that the district court erred in granting summary judgment on the particular ground that Dr. Blair's affidavit was insufficient to support a conclusion that the Hospital possessed monopoly power in the relevant durable medical equipment [DME] market. The district court also did not consider whether Pleasant Valley had willfully acquired or maintained monopoly power, *see M & M Medical Supplies & Serv. v. Pleasant Valley Hosp., Inc.*, 738 F.Supp. 1017, 1020 (S.D.W.Va.1990). We may affirm summary judgment, however, on any ground apparent from the record, even if the basis chosen by the district court proves erroneous. *See, e.g., Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 685 & n. 10 (4th Cir.1992); *cf. Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 210-11, 41 S.Ct. 451, 451-52, 65 L.Ed. 892 (1921).

While a Hospital nurse encouraged one employee to have her husband switch his DME provider from M & M to the Equipment Company, M & M failed to show that the nurse was forced to suggest this change; indeed, M & M did not show that the overture was prompted by the Hospital or even that the Hospital knew of its occurrence. Nor did M & M show that the employee was threatened with adverse job consequences if her husband refused to switch providers. *See* J.A. at 137-38. Although the Hospital suggested to its staff physicians that they refer their patients to the Equipment Company for DME, M & M did not proffer evidence that the staff was required to do so. And, finally, although M & M proffered evidence that the Hospital required that the few infant monitors used in the Hospital be supplied by the Equipment Company, it adduced no evidence that the Hospital forbad its patients' use of other monitors outside the Hospital, or that it required that any other DME used in the Hospital be supplied by the Equipment Company. From the evidence put forward by M & M, it just cannot reasonably be inferred that the Hospital used monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948).

Neither *Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir.1990), nor *Key Enters. of Del., Inc. v. Venice Hosp.*, 919 F.2d 1550 (11th Cir.1990), suggests otherwise. In both *Advanced Health-Care* and *Key Enterprises*, hospitals either explicitly tied DME sales to the provision of hospital services, entered into exclusive dealing agreements with specific DME providers, and/or took other affirmative steps to prevent DME sales to their patients by vendors not affiliated with those hospitals. *See Key Enterprises*, 919 F.2d at 1558 (antitrust liability predicated on a "hospital's refusal to allow other DME vendors access" to

patients);[2] *Advanced Health-Care*, 910 F.2d at 148-49 (hospitals alleged to "have linked the purchase of DME to the provision of their hospital services" and engaged in "the purposeful exclusion of [a] competitor from gaining access to . . . patients" through exclusive dealing agreements). M & M proffers no evidence that Pleasant Valley Hospital conditioned the provision of medical services upon patients' ordering their DME from the Equipment Company, that it entered into an exclusive dealing agreement with the Equipment Company, that it attempted to deny third-party vendors access to the Hospital's patients, or that it engaged in any other activity of restricting patient choice in DME purchases or foreclosing compeition by its competitors.

Where challenged business activity is consistent with legal competition, courts will not presume an antitrust violation absent "evidence that tends to exclude" the possibility of legitimate conduct. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1470, 79 L.Ed.2d 775 (1984). M & M's proffer is devoid of any such evidence. Accordingly, summary judgment was warranted. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

II.

I would also affirm summary judgment in favor of Pleasant Valley on M & M's attempted monopolization claim, because I believe the district court correctly concluded that there was "insufficient evidence of specific intent to monopolize on the part of [the Pleasant Valley companies]," 738 F.Supp. at 1021. A section 2 claim for attempted monopolization must satisfy an even more exacting standard than must a monopolization claim. *See*

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[2] *Key Enterprises*, in any event, was recently vacated by the Eleventh Circuit and rehearing *en banc* was granted. *Key Enters. of Del., Inc. v. Venice Hosp.*, 979 F.2d 806 (11th Cir.1992).

Aspen Skiing, 472 U.S. at 602-03, 105 S.Ct. at 2857. It requires, *inter alia,* proof that the defendant formed a specific intent to monopolize a market. *See, e.g., id.; Swift & Co. v. United States,* 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905); *Abcor Corp. v. AM Int'l, Inc.,* 916 F.2d 924, 926-27 (4th Cir.1990). Mere proof of an intent to do the act is insufficient, *see United States v. Aluminum Co. of Am. (Alcoa),* 148 F.2d 416, 432 (2d Cir.1945); "a specific intent to destroy competition or build monopoly" is necessary, *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 626, 73 S.Ct. 872, 890, 97 L.Ed. 1277 (1953).

The majority holds that a specific intent by the Hospital to monopolize may be inferred from evidence of what it characterizes as the Hospital's "anticompetitive" practices. *See ante* at 167-68. Most disturbingly, the court identifies as an "anticompetitive" practice the fact that "[w]hen the Equipment Company commenced business, it deliberately set DME prices below those of its competing suppliers." *Id.* at 167. The court reasons that M & M was "entitled" to the inference that "*this* [sale of its products at a price lower than its competitors] was an anticompetitive step toward attempted monopoly." *Id.* (emphasis added). The obvious effect of this novel holding, for which the majority offers no support, is that an antitrust plaintiff can avoid summary judgment on an attempted monopolization claim merely by proffering evidence that the defendant set its prices below those of its competitors.[3]

The majority asserts in explanation that the revenues the Equipment Company lost by setting its prices below those of its competitors constitute "self-induced injury . . . no less significant for summary judgment purposes than

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[3] There is no evidence in this case that the Equipment Company engaged in predatory pricing (*i.e.*, pricing below cost) in order to force competitors out of the market. *See Matsushita,* 475 U.S. at 584 n. 8, 106 S.Ct. at 1355 n. 8.

that in *Aspen Skiing*." *Id.* This assertion is flawed in two respects. First, it proceeds from the premise—unsupported by the evidence—that the Equipment Company was injured at all by setting its prices below those of its competitors. Insofar as the record discloses, the Company, as a new market entrant, had to offer its equipment at prices below those of its more established competitors (like M & M) to attract customers. In other words, there is no evidence that the Equipment Company *lost* profits by setting its prices below those of its competitors; it may well have *gained* profits from sales that it otherwise would not have been able to make, due to its recent entry into the market. The burden is upon the plaintiff in a summary judgment context to proffer evidence from which it can reasonably be inferred that a loss occurred.

Second, the majority's assertion ascribes to the term "self-induced injury" a meaning never contemplated by the Supreme Court in *Aspen Skiing*. Standing alone, the "potential loss" represented by the setting of prices above cost but below those of competitors has never been considered self-induced injury of the type that can give rise to a section 2 violation, especially where, as here, a new competitor is attempting to enter and compete in an established market. This is "the very essence of competition." *Matsushita,* 475 U.S. at 594, 106 S.Ct. at 1360; *accord Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 338, 110 S.Ct. 1884, 1891, 109 L.Ed.2d 333 (1990); *see also United States Steel Corp. v. Fortner Enters., Inc.,* 429 U.S. 610, 612 n. 1, 97 S.Ct. 861, 863 n. 1, 51 L.Ed.2d 80 (1977) ("No inference of intent to monopolize can be drawn from the fact that a firm with a small market share has engaged in non-predatory competitive conduct in the hope of increasing sales."). Any other conclusion would effectively insulate established firms like M & M from competitive pressures and guarantee their profits, contrary to the purposes of the antitrust laws. As the Supreme Court has observed:

"To hold that the antitrust laws protect competitors from the loss of profits due to . . . price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116, 107 S.Ct. 484, 492, 93 L.Ed.2d 427 (1986); *see also USA Petroleum*, 495 U.S. at 337, 110 S.Ct. at 1891 ("When a firm . . . lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an 'anti-competitive' consequence of the claimed violation."); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir.1986) (even a firm with lawful monopoly power has "no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches").

The contrast between this type of conduct and the self-induced injury held sufficient in *Aspen Skiing* is readily apparent. In *Aspen Skiing*, the plaintiff Highlands, which owned one of Aspen, Colorado's four major ski areas, previously had engaged in a joint marketing effort with the defendant, Ski Co., which owned the other three areas. Under this plan, the two companies sold multi-day, multi-area passes which allowed purchasers to frequent any of the four areas on a given day. 472 U.S. at 589-93, 105 S.Ct. at 2850-52. Ski Co. withdrew from the plan and offered multi-day, multi-area passes to its three areas alone. Highlands, eliminated from the multi-area pass market, first attempted to purchase Ski Co. lift tickets in bulk, and later set up a guaranteed voucher system for the purchase of such lift tickets, in an attempt to recreate the four-area pass by coupling Highlands passes with vouchers that would allow skiing at the Ski Co. areas.

Ski Co. declined to sell lift tickets to Highlands and refused to accept the vouchers, thereby intentionally for-

going the revenues that would be earned from the additional pass sales. *Id.* at 593-95, 105 S.Ct. at 2852-53. The Supreme Court held that Ski Co.'s decision "to forgo these short run benefits," coupled with the fact that Ski Co. possessed monopoly power, permitted an inference that the defendant intended to force its competitor out of business even at the expense of its own short-term profits. *Id.* at 608, 105 S.Ct. at 2860.

Unlike the defendant in *Aspen Skiing*, there is no evidence that the Pleasant Valley companies ever forwent revenue or other benefits for *any* reason, much less for the purpose of harming their competitors. The only reasonable inference from the record is that the Equipment Company was doing all within its power to increase its sales and profits by reducing its prices so as to compete with its more established competitors.

The court also identifies as an anticompetitive practice the fact that the Equipment Company eventually raised its DME prices above those of M & M. The court characterizes the Equipment Company's pricing above its competitors as "anticompetitive pricing." *Ante* at 167.[4] The mere pricing of a product above the price of a competitor's product is not itself anticompetitive. The higher priced product may in fact be superior in quality and thus deserving of the higher price. If the product is not superior, then consumers will refuse to purchase the product—precisely the response sought in a system of competition.

Presumably the court does not mean to hold (although it does) that pricing above a competitor is itself an antitrust violation, but rather that such pricing and the ability to maintain such prices without losing sales may be

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[4] It is significant that the court therefore holds today that it is an anticompetitive practice to sell both at prices *below* and *above* the competition. The only way to avoid antitrust liability, according to the majority, is to fix prices at the levels maintained by the competition, a practice that is itself suspect under the Sherman Act.

evidence of an anticompetitive practice. There is in this record, however, no evidence of other anticompetitive practices. The court lists as anticompetitive practices the Hospital's referral of its patients to the Equipment Company, the Hospital's failure to inform its patients about its competitors, and the Hospital's suggestion to its physicians that they refer patients to the Equipment Company. The court, however, offers no authority for its suggestion that the antitrust laws require that a market participant refer customers to its competitors or inform them of their competitors' existence. Nor does it cite any authority for the assertion that it is anticompetitive for a company to promote its subsidiary's products through its own employees.[5] As noted *supra* at 170-72, I do not believe that any of this evidence can be "fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory'," *Aspen Skiing*, 472 U.S. at 602, 105 S.Ct. at 2857; it is, in my view, all consistent with wholly legitimate business practice.

In short, M & M has not shown through direct evidence that the defendants had a specific intent to monopolize; nor has it proffered evidence of anticompetitive practices from which a specific intent to monopolize may be inferred.[6] "[T]he record reveals no more than vigorous competition" by a new market entrant, *Abcor*, 916 F.2d at 927-28, precisely the kind of conduct that the antitrust laws are intended to encourage.

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[5] The court relies generally upon *Advanced Health-Care* as support for its holding. *See ante* at 172. For the reasons stated *supra* at 162-63, this case is easily distinguished from the case *sub judice*.

[6] I would also hold that M & M's proffer is insufficient as a matter of law to establish genuine issues of material fact as to the other elements of an attempted monopolization claim—namely, "anticompetitive or predatory conduct" and a "dangerous probability of success." *Abcor*, 916 F.2d at 926; *see also Swift*, 196 U.S. at 396, 25 S.Ct. at 279.

III.

Because M & M failed to raise genuine issues of material fact as to essential elements of its monopolization and attempted monopolization claims, I believe the district court properly granted summary judgment in favor of Pleasant Valley on those claims. I therefore respectfully dissent. I am authorized to state that Circuit Judge DONALD RUSSELL and Circuit Judge WILKINSON join this dissenting opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 90-3100

M & M MEDICAL SUPPLIES AND SERVICE, INCORPORATED,
Plaintiff-Appellant,

v.

PLEASANT VALLEY HOSPITAL, INCORPORATED; PLEASANT VALLEY HOME MEDICAL EQUIPMENT, INCORPORATED,
Defendants-Appellees.

Argued March 5, 1991

Decided Oct. 22, 1991

Appeal from the United States District Court for the Southern District of West Virgini, at Parkersburg
Charles H. Haden, II, Chief District Judge
(CA-88-1099-A)

Argued: James Allen Burt, Burt and Associates, Orlando, Fla., for appellant; John Earl Jenkins, Jr., Jenkins, Fenstermaker, Krieger, Kayes & Farrell, Huntington, W.Va., for appellees.

On Brief: Richard A. Bush, Bush & Trippel, Parkersburg, W.Va., for appellant Steven R. Bartram, Jenkins, Fenstermaker, Krieger, Kayes & Farrell, Huntington, W.Va., Carroll W. Casto, Casto & Casto, L.C., Point Pleasant, W.Va., William G. Kopit, Epstein, Becker & Green, P.C., Washington, D.C., for appellees.

AFFIRMED IN PART, REVERSED IN PART, VACATED AND REMANDED.

Before K.K. HALL, Circuit Judge, BUTZNER, Senior Circuit Judge, and TERRENCE WILLIAM BOYLE, United States District Judge for the Eastern District of North Carolina, sitting by designation.

OPINION

TERRENCE WILLIAM BOYLE, District Judge:

This is a suit between competitors engaged in the sale of durable medical equipment [1] (DME) in Mason County, West Virginia. The plaintiff seeks damages from the defendants for monopolization, and for an attempt to monopolize, under Section 2 of the Sherman Antitrust Act. The district court entered summary judgment for the defendants and plaintiff appeals. Because we find summary judgment to be inappropriate, we vacate and remand.

I.

M & M Medical Supplies, the plaintiff, is a dealer in durable medical equipment in Point Pleasant, Mason County, West Virginia. Pleasant Valley Hospital, and its wholly owned subsidiary, Pleasant Valley Home Medical Equipment, the defendants, are engaged in hospital services and the provision of durable medical equipment, respectively, in Point Pleasant.

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[1] DME refers to medical appliances—wheelchairs, oxygen equipment, and walkers—which are often used to aid persons who are convalescing at home after hospitalization.

Pleasant Valley Home Medical Equipment Company opened in 1985. Since then the Hospital has used the Equipment Company as a source for DME for its outgoing patients. The Hospital places patient orders, with the Equipment Company, without the patient being allowed the opportunity to choose among competitors. The Hospital also endeavors to sell Equipment Company products to its employees and encourages them to support the Equipment Company in their private needs for DME.

M & M brought suit against the Hospital and the Equipment Company alleging that the Hospital's practice of ordering DME exclusively from the Equipment Company violates Section 2 of the Sherman Act.[2] Plaintiff alleges that it has a claim for monopolization and a claim for attempted monopolization. Plaintiff also alleges that the facts support a claim under the monopolization theory of "monopoly leveraging." Other antitrust violations are alleged but have not been pursued on appeal.

After discovery, the defendants moved for summary judgment. The district court granted this motion based on its determination that the plaintiff had failed to show either that the defendants had "monopoly power" in the marketplace or that the defendants had attempted to monopolize the DME market. The district court also ruled that the theory of "monopoly leveraging" is not a distinct claim under the Sherman Act, but rather is a redundant allegation of the claim for attempted monopolization.

II.

We must decide whether M & M has made out a prima facie case of monopolization sufficient to withstand summary judgment. In order for M & M to do this, it must

[2] 15 U.S.C. § 2 provides in pertinent part as follows: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of [an offense against the United States]."

produce evidence sufficient to support each of the elements of its claims. If it has done so, and therefore raised contested issues of fact on these elements, summary judgment is inappropriate.

The first element of a claim of monopolization under Section 2 of the Sherman Act is the defendant's exercise of "market power." To prove the exercise of market power against a defendant, a plaintiff must show that the defendant has monopoly power over a product in some relevant geographic market. See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Catlin v. Washington Energy Co., 791 F.2d 1343, 1347 (9th Cir. 1986).

The exercise of market power is composed of two independent prongs: (1) the existence of some specific, defined geographic market for the product, and (2) the exercise of monopoly power by the defendants over the product in this relevant market. Satellite Television & Associated Resources, Inc., v. Continental Cablevision of Virginia Inc., 714 F.2d 351 (4th Cir. 1983), cert. denied, 465 U.S. 1027 (1984). Failure to prove either prong will result in the dismissal of plaintiff's entire claim. Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 495-96 (4th Cir. 1986), cert. denied, 481 U.S. 1050 (1987); Satellite Television, 714 F.2d at 357.

The parties dispute the size of the relevant market. The plaintiff claims the market is Mason County, West Virginia. The defendants claim that a larger area straddling the Ohio River Valley defines the relevant market—including Galia and Meigs Counties, Ohio, and Mason County, West Virginia.

The parties also dispute whether the defendants have exercised monopoly power. In order to prove that a party has monopoly power, there must be proof that the party has the power to control prices or unreasonably restrict competition in a relevant market. United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 389 (1956)

(citing Standard Oil Company v. United States, 221 U.S. 1, 58 (1911)). Monopoly power is a necessary component of any illegal monopolization, as it would be impossible for a party to monopolize a market unless that party had the power to do so.

M & M has submitted the affidavit of its expert-economist, Roger Blair, as proof of both the relevant market and the exercise of monopoly power. Dr. Blair's affidavit states that his opinions are based on a review of the patient origin data provided by the Hospital and the Equipment Company.

Dr. Blair asserts that the relevant market in this case is Mason County:

[T]he patient origin data strongly suggest that Mason County residents rely predominantly upon Mason County suppliers for their hospital and medical equipment needs. Some overlap into the neighboring Ohio counties is to be expected but does not change the unmistakable conclusion that Mason County represents a distinct geographic market for antitrust analysis.

Dr. Blair also states that the Equipment Company has exercised monopoly power in the market. He says:

Pleasant Valley Home Medical Equipment is exercising monopoly power—i.e., the power to raise price or exclude competition. Pleasant Valley Home Medical Equipment has held its prices above those charged by M & M Supplies and Services on numerous articles of DME for over a year without losing significant numbers of customer [sic]. This is a direct measure of monopoly power.

We must decide whether the testimony of an expert is sufficient to support a prima facie showing of monopoly power and relevant market. Such a showing would create a contested material issue of fact on these elements.

The defendants have offered counter-affidavits challenging the conclusions of the plaintiff's expert. The defend-

ants argue that the opinion evidence by plaintiff's expert must be supported by a factual predicate and that, without a factual basis to support this expert's opinion, it is insufficient to prove the elements in issue. Plaintiff points out that the plaintiff's ability to develop facts dealing with consumer patterns, market share, and the relationship between patient care at the Hospital and DME purchases from the Equipment Company have all been inhibited by the defendants' procurement of a protective order from the court limiting the plaintiff's access to patients.

A party resisting summary judgment must set forth specific facts in order to raise a material issue as to each element of that party's claim. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). We believe that the plaintiff has satisfied this burden by the statements of its experteconomist, by the inferences permissibly drawn in plaintiff's favor from evidence not in dispute, and by the circumstances of discovery in this case which limited plaintiff's access to relevant patient data.

The expert's opinion does not stand alone. It must be considered with evidence that the defendant Hospital is the sole hospital in Mason County and that the majority of all DME consumers in the county have their initial need for such equipment as a result of either inpatient or outpatient hospital care. The Hospital's evidence shows that the majority of all Mason County residents use the defendant Hospital for their hospital-based needs. Evidence that Hospital employees were encouraged to purchase Equipment Company products its consistent with the conclusions drawn by plaintiff's economist.

Under these circumstances, the evidence supports plaintiff's claim that Mason County is the relevant market, and that the defendants exercised "monopoly power." This combination of expert opinion and factual support found in the record distinguishes this case from those in which a party has no more, in opposition to summary judgment,

than the unsupported opinion of an expert. See Mid-State Fertilizer v. Exchange National Bank, 877 F.2d 1333, 1339 (7th Cir. 1989). Because the trial court did not analyze the remaining element of monopolization [3]—whether the defendants acted willfully in acquiring or maintaining their market power—we remand this claim for further consideration.

III.

Plaintiff also challenges the district court's allocation of the plaintiff's burden of production with respect to the motion for summary judgment. Plaintiff argues that as the non-movant it was erroneously charged with a duty of producing evidence in order to overcome the motion. Since we find that summary judgment was inappropriate, it is unnecessary for us to address the burden of production arguments beyond stating that the district court properly followed the sequence of proof required in resistance to a motion of summary judgment under Rule 56(e) as set out by the Supreme Court in Celotex. The district court required plaintiff to produce evidence of each element of every claim sufficient to establish a prima facie case and to demonstrate that there are contested material facts as to these elements.

IV.

M & M also appeals the dismissal of its Section 2 Sherman Act claim for attempted monopolization. To prove attempted monopolization, the plaintiff must show (1) a specific intent to monopolize a relevant market, (2) predatory or anticompetitive acts, and (3) a dangerous prob-

[3] Monopolization is present where two elements are satisfied: (1) the defendant exercised market power (which, as already noted, is further composed of the exercise of monopoly power over a relevant product within a relevant market), and (2) the defendant willfully acquired or maintained this market power. United States v. Grinell Corp., 384 U.S. 563, 570-71 (1966). The trial court found that M & M had failed to prove the prongs of the first element, and therefore did not analyze the second element.

ability of successful monopolization. Advanced Health-Care Services, Inc. v. Hadford Community Hospital, 910 F.2d 139, 147 (4th Cir. 1990); Abcor Corp. v. AM International, Inc., 916 F.2d 924, 926 (4th Cir. 1990); White Bag v. International Paper, 579 F.2d 1384, 1387 (4th Cir. 1974). The elements are strongly interrelated. For example, the first element, intent, may be inferred solely from the presence of the second element, predatory or anticomptitive acts. William Inglis & Sons v. ITT Continental, 668 F.2d 1014, 1029 & n.11 (9th Cir. 1981).

The trial court dismissed this claim, finding that the Hospital's alleged practice of referring all DME patients to the Equipment Company did not constitute coercive activity, and that in the absence of any coercive behavior there could be no inference that defendants intended to monopolize the DME market.

In essence, the district court believed that the defendants' acts, assuming them to be true, could not be coercive or predatory. M & M asserts that, when taken as a whole, the evidence presented supports an inference of coercive behavior. We agree and reverse the trial court's dismissal of the attempted monopolization claim.

Since the party resisting the motion for summary judgment is entitled to the benefit of all inferences in its favor based on the evidence presented, we believe that the following facts were before the court: The Hospital operated as the sole hospital in Mason County. Its outgoing patients constituted the majority of all DME consumers in the area. The Equipment Company is a wholly owned subsidiary of the Hospital. The Hospital orders all DME for outgoing patients from the Equipment Company. Patients are not notified of this fact, nor are they affirmatively given a choice as to the DME supplier that will be used. Competitor DME dealers are excluded from the Hospital. Affidavits show that some outgoing patients do

eventually discover this "subordination of their freedom of choice," and some have been angered by the Hospital's actions.

M & M argues that the defendants' continuation of these policies shows a willingness to make short-term sacrifices in order to drive the plaintiff out of business.

Subsequent to the trial court's decision, this court decided the case of Advanced Health-Care, supra. Many of the allegations in that case are similar to those in this case. There, an independent DME distributor brought suit under the Sherman Act against three hospitals which also "steered" their patients to certain affiliated DME distributors in return for a share of the profits. Some of the steering tactics that were alleged in Advanced Health-Care are identified to those alleged by M & M, including the ordering of DME for patients without inquiring whether the patient preferred a different DME distributor. Before discovery commenced, the trial court granted the defendants' motion to dismiss under Fed.R.Civ.P. 12 (b)(6), finding that such steering could not form the basis of an actionable claim.

Reversing, this court held that the key to distinguishing legal competitive acts from predatory ones is whether the acts were based on superior efficiency. Id. at 147 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp, 472 U.S. 585, 602-3 (1985).

The court concluded that linking the sale of DME to the provision of hospital services was sufficiently predatory to allow an inference of intent to monopolize. Id. See also Key Enterprises of Delaware, Inc. v. Venice Hospital, 919 F.2d 1550, 1558 (11th Cir.1990). In Key Enterprises, the court held that a similar linking of DME to hospital services violated the Sherman Act. The court concluded that the defendant-hospital's practice of allowing only the defendant-DME company to contact hospital patients was an anticompetitive act which "im-

paired competition *in an unnecessarily* restrictive way." Accord Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 528 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions . . ."). An act is coercive if it acts to cripple the freedom of choice of consumers. Id. 459 U.S. at 528 n. 18.

As stated in Advanced Health-Care, the linking of DME to hospital services constitutes anticompetitive activity which may support an inference of intent to monopolize.

V.

Plaintiff contests the trial court's entry of a protective order limiting its contact with former Hospital patients.

During the discovery process, in January of 1989, M & M served a request upon the Hospital for production of a list of patient names and addresses. The Hospital agreed to produce the documents for inspection and, in fact, did produce a voluminous set of documents which M & M reviewed. However, based on the alleged subsequent harassment by M & M of these patients, the defendants refused to produce photocopies of these same documents and moved for a protective order in April, 1989. The defendants sought to enjoin M & M from further contact with the Hospital patients identified through the Hospital records. The trial court granted this protective order.

A trial court may limit discovery through the entry of a protective order, under Rule 26(c). Such an order is entered in the sound discretion of the court, and will not be disturbed unless an abuse of this discretion is shown. K.L. Group v. Case, Kay & Lynch, 829 F.2d 909, 915 (9th Cir.1987).

Since this case will be returned to the district court for further proceedings, we see no reason to interfere with

the district court's future rulings on discovery and the introduction of evidence, leaving those to circumstances as they may develop.

VI.

The final issue on appeal is the trial court's finding that one of plaintiff's antitrust theories was not cognizable under the Sherman Act. The court held that the claim of "monopoly leveraging" did not state an antitrust violation distinct from "attempted monopolization."

Monopoly leveraging has been recognized as a distinct antitrust violation by several courts. See Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135, 136-37 (6th Cir.1988), cert. dismissed, G.K.C. Michigan Theatres, Inc. v. National Amusements, Inc, 490 U.S. 1087 (1989); Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 681 (2d Cir.1985). The D.C. Circuit, Ninth Circuit, and this circuit have expressly reserved judgment for a case that squarely raises the issue. Catlin v. Washington Energy Co., 791 F.2d 1343, 1346 (9th Cir.1986); Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Asso., 735 F.2d 577, 586 n. 15 (D.C.Cir.1984); Advanced Health- Care, 910 F.2d at 149 n. 17.

The elements that must be proven to show monopoly leveraging are "monopoly power in one market; the use of that power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another distinct market; and injury caused by the challenged conduct." Grand Light, 771 F.2d at 681. In sum, it is the action of using already-held monopoly power in one market to force consumers to do business with the monopolist in another market, to the detriment of the consumer. Under the monopoly leveraging theory, a plaintiff need not prove that the defendant attempted to monopolize the secondary market; the plaintiff need only prove that the defendants gained a competitive advantage. Berkey Photo, Inc. v. Eastman

Kodak Co., 603 F.2d 263 (2nd Cir.1979), cert. denied, 444 U.S. 1093 (1980).

Because we find that the appellant has stated other related Section 2 claims that require a remand of this case for further proceedings, we assume that monopoly leveraging is an independent Section 2 violation separate from monopolization and attempted monopolization. We reserve definitive resolution of that issue until such time as that issue is squarely presented. See Advanced Health-Care, 910 F.2d at 149 n. 17.

VII.

In conclusion, summary judgment entered against plaintiff on its claim under Section 2 of the Sherman Antitrust Act for monopolization is vacated and remanded for further consideration of the summary judgment motion consistent with this opinion. The summary judgment entered against plaintiff on its claim for an attempt to monopolize and for monopoly leveraging under Section 2 of the Sherman Antitrust Act is reversed, and those claims are remanded for further proceedings in the district court. The protective order of the district court on discovery is affirmed.

AFFIRMED IN PART, REVERSED IN PART, VACATED, AND REMANDED.

BUTZNER, Senior Circuit Judge, joins.

K.K. HALL, Circuit Judge, dissents.

K.K. HALL, Circuit Judge, dissenting:

The plaintiff in this case, M & M Medical Supplies, has failed to carry its burden in opposition to the hospital's motion for summary judgment; therefore, I respectfully dissent from the majority's reversal.

The majority acknowledges that the first element of a claim of monopolization under § 2 of the Sherman Act

is "market power." In order to prove the exercise of market power, a plaintiff must show (1) the existence of some specific, defined geographic market for the product, i.e., the "relevant market," and (2) the exercise of monopoly power by the defendants in that market. Proof of both parts is critical because "[f]ailure to prove either prong will result in the dismissal of plaintiff's entire claim." Slip Op. at 4. Determining the relevant market is a factual inquiry. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1299 (9th Cir.), cert. denied, 459 U.S. 1009 (1982). The plaintiff must define the geographic area in which the suppliers effectively compete. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 331-32 (1961).

The majority states the correct test under Celotex, but then fails to properly apply it to the facts of this case. In opposition to Pleasant Valley's motion for summary judgment, M & M submitted an affidavit of Dr. Blair. An expert's affidavit submitted in opposition to a motion for summary judgment must set forth specific facts to support its conclusions. Fed.R.Civ.P. 56(e); Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985). The district court properly rejected Dr. Blair's affidavit because it consisted of mere conclusory assertions and furnished no specific facts in opposition of the motion for summary judgment.

Dr. Blair stated in his affidavit that he reviewed the materials produced by Pleasant Valley and conducted a personal investigation. However, he neither quoted any facts from the materials he relied on nor specifically referred to any revealing facts. In addition, Dr. Blair conceded that some overlap into the neighboring Ohio counties occurs but gave no facts to demonstrate how much overlap exists either in absolute or relative terms. In short, the plaintiff failed to show the existence of a specific, defined geographic market, and, therefore, summary judgment was properly entered against M & M.

The deficient affidavit affects the claim of attempted monopolization as well. A relevant market must first be established by facts before a plaintiff can establish that a defendant had a specific intent to monopolize it. Without this basic element, this claim must also fail.

I would affirm the district court's grant of summary judgment.

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. WEST VIRGINIA

PARKERSBURG DIVISION

Civ. A. No. A:88-1099

M & M MEDICAL SUPPLIES AND SERVICE, INC.,
Plaintiff,

v.

PLEASANT VALLEY HOSPITAL, INC., *et al.*,
Defendants.

June 6, 1990

James A. Burt and James A. Gustino, Burt & Gustino, Orlando, Fla., and Richard A. Bush, Bush & Trippel, Parkersburg, W. Va., for plaintiff.

John E. Jenkins, Jr. and Beverly A. Uhl, Jenkins, Fensetermaker, Frieger, Kayes & Farrell, Huntington, W. Va., and Carroll W. Casto, Casto & Casto, Point Pleasant, W.Va., for defendants.

MEMORANDUM OPINION AND ORDER

HADEN, Chief Judge.

Pending before the Court is the Defendants' motion for summary judgment. The issues raised therein have been fully briefed.

The Plaintiff M & M Medical Supplies and Service, Inc. (M & M) is in the business of selling and renting durable medical equipment (DME). The Defendant Pleasant Valley Hospital, Inc. (the Hospital) operates an acute care hospital facility. The Defendant Pleasant Valley Home Medical Equipment, Inc. (the Equipment Company) is also in the DME business. All parties' businesses are located in Point Pleasant, Mason County, West Virginia.

The Equipment Company came into existence in 1985 when the Hospital decided to expand into the DME business.

The Defendants acknowledge that the reason for this expansion was to aid in offsetting reductions in Medicare and Medicaid reimbursements. Since the Equipment Company's entry, M & M's business has declined and it has suffered a decrease in revenues. M & M claims that it has been injured as a result of the Defendants' actions. In particular, the Plaintiff complains that the Defendants have violated federal anti-trust statutes by directing hospital patients exclusively to the Equipment Company for their DME needs upon discharge and that such conduct has resulted in the complete elimination of competition in the Point Pleasant DME market.

By their motion for summary judgment the Defendants contend that no genuine issues of material fact exist in this case and that, therefore, they are entitled to judgment as a matter of law. In order to withstand a motion for summary judgment, a nonmoving party must "make a showing sufficient to establish the existence of an element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In other words, the Plaintiff must present evidence sufficient to raise a question of fact as to every element of each of its causes of action if it is to overcome the Defendants' motion for summary judgment as to that particular claim.

The Plaintiff has asserted six separate anti-trust claims—restraint of trade, monopolization, attempted monopolization, levering of monopoly power, conspiracy to monoplize, and exclusive dealing—as well as a pendent claim of tortious interference with business relationships.

I. Sherman Act, Section 1

The Plaintiff has alleged that the Defendants' conduct has resulted in an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides in pertinent part as follows:

> "Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . ." [1]

Section 1 reaches only concerted action and does not prohibit unilateral conduct.

The essence of a Section 1 claim is an agreement between separate entities to engage in activity in restraint of trade. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), the Court recognized that an "agreement" between a parent and its wholly-owned subsidiary represents merely unilateral conduct. The Court held, therefore, that a corporation and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." *Id.* at 777, 104 S.Ct. at 2745.

In this case the Defendants have presented evidence to support their contention that the equipment company is a wholly owned subsidiary of the Hospital. Krimm deposition at 72-73. The Plaintiff has presented no evidence to create a factual issue in this regard. Considering the undisputed nature of the relationship between the De-

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[1] A private right of action is provided for violation of this and other federal anti-trust statutes. 15 U.S.C. § 15.

fendants, therefore, the Court concludes as a matter of law that the Defendants are incapable of engaging in concerted action between themselves so as to violate Section 1 of the Sherman Act.

II. Sherman Act, Section 2

The Plaintiff has also alleged that the Defendants violated Section 2 of the Sherman Act, 15 U.S.C. § 2, which provides in pertinent part as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of [an offense against the United States]."

The Plaintiff has asserted several causes of action pursuant to Section 2.

A. Monopolization.

First, M & M has claimed that the Defendants' conduct has resulted in monopolization of the DME market. In order to succeed on such a claim, the Plaintiff must establish that a defendant has monopoly power in the relevant product and geographic markets, and that such power was willfully acquired or maintained. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966).

Proof of each of these elements is essential to a Section 1 recovery.

"[A] party has monopoly power if it has, over 'any part of the trade or commerce among the several States,' a power of controlling prices or unreasonably restricting competition." *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 389, 76 S.Ct. 994, 1004, 100 L.Ed. 1264 (1956), *citing Standard Oil Co. v. United States*, 221 U.S. 1, 58, 31 S.Ct. 502, 515, 55 L.Ed. 619 (1911).

Whether a party has monopoly power is determined by reference to the relevant product and geographic markets.

In opposition to the Defendants' motion, the Plaintiff has submitted the affidavits of Roger D. Blair, who for the purposes of this motion the Court will treat as an expert in the field of economics. Dr. Blair has stated in his affidavit that there are two relevant product markets in this case: the market for hospital services and the market for durable medical equipment. He has stated that the relevant geographic market is Mason County, West Virginia. He has set forth no facts to support these opinions, nor has he provided facts to support the Plaintiff's contention that the Defendant Equipment Company has monopoly power in the DME market. Dr. Blair has stated only that the Equipment Company "has held its prices above those charged by M & M Supplies and Services on numerous articles of DME for over a year without losing significant numbers of customer [sic]." Dr. Blair has cited no specific examples of such conduct. The Plaintiff likewise has presented no evidence beyond its conclusory allegations that the Equipment Company has erected barriers to entry into the DME market in Mason County, West Virginia.

In order to raise a question of fact, an expert's affidavit "must set forth specific facts showing that there is a genuine issue for trial." *Rule* 56(e), Federal Rules of Civil Procedure. The Court is aware, of course, that expert testimony is subject to special rules. For example, *Rule* 703, Federal Rules of Evidence, provides that an expert may base his or her opinion on inadmissible facts if they are of a type reasonably relied upon by experts in that field. *Rule* 705 allows an expert to give opinion testimony without prior disclosure of underlying facts. The specific facts requirement of *Rule* 56(e), however, is not altered by these evidentiary rules. *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985).

Considering M & M's failure to establish an issue of fact regarding the Equipment Company's monopoly power

within the relevant markets, the Court need not consider the remaining element of its monopolization claim—willful acquisition or maintenance of such power. The Plaintiff cannot prevail on its Section 2 monopolization claim.

B. Attempted monopolization/leveraging.

To establish attempted monopolization, the Plaintiff must prove that the Equipment Company had the specific intent to monopolize the DME market within the relevant geographic market, that it engaged in predatory or anti-competitive conduct for that purpose, and that there was a dangerous probability that it might succeed in monopolizing the DME market. *Swift and Co. v. United States*, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed.2d 518 (1905). To satisfy these elements, the Plaintiff argues briefly that

> "The Hospital specifically intended to dominate the durable medical equipment market and extract the profits therefrom to offset losses associated with cutbacks in federal Medicare programs. This evinces a specific intent to monopolize the durable medical equipment market in Mason County, West Virginia. The fact that all durable medical equipment patient referrals from Pleasant Valley Hospital now are placed with the Hospital-owned company demonstrates a dangerous probability of monopolization of the durable medical equipment market."

Plaintiff's memorandum at 9.

While there is evidence of record that the Hospital wished to offset Medicare losses, this evidence alone will not support an inference of specific intent to monopolize the DME market. Nor is the Plaintiff's allegation that the Hospital referred all DME patients to the Equipment Company sufficient to raise an inference of specific intent to monopolize on the part of the Equipment Company. Even assuming that to be a true statement, the evidence of record does not indicate that the patients were coerced or

forced in any way to satisfy their DME needs through the Equipment Company to the exclusion of all of its competitors.

The Plaintiff has also alleged that the Defendant Hospital improperly used monopoly power in the health care market to gain advantage in the DME market. Although M & M refers to this claim as leveraging, Section 2 of the Sherman Act clearly does not provide a cause of action for conduct so denominated. The Plaintiff's allegaitons of leveraging merely state a claim for attempted monopolization.

"Use of monopoly power "to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of § 2 of the Sherman Act." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S.Ct. 1022, 1029, 35 L.Ed.2d 359 (1973), *quoting Lorain Journal Co. v. United States*, 342 U.S. 143, 154, 72 S.Ct. 181, 187, 96 L.Ed. 162 (1951). In *Otter Tail*, the defendant with undisputed monopoly power in the electric power transmission market used that dominant position to foreclose competition in the retail electric power market.

Because the use of monopoly power in one market with intent to harm competition in another market is prohibited as an attempt to monopolize under Section 2 of the Sherman Act, traditional attempt elements must be established to prove the Plaintiff's claim of leveraging. As noted earlier, there is insufficient evidence of specific intent to monopolize on the part of either Defendants in this case.

Likewise, assuming the Hospital has monopoly power in the health care market in Mason County, there is no other evidence to support the dangerous probability of success element. The Plaintiff must present evidence indicating that the Hospital's monopoly power enabled it to coerce DME customers to use the Equipment Company rather than other suppliers of DME.

In this regard, the Plaintiff has presented the affidavits of several DME customers who have stated generally that they were not advised of other suppliers nor told that they had a choice as to where to obtain DME. The affidavits of Reed Sturgeon, Karen Broadwater, Jean Taylor and Karen Sue Krebs state that Hospital personnel ordered DME for patients from the Equipment Company without consulting the patients as to which DME supplier they preferred.

Another affiant, Maxine Hatfield, indicated that the Hospital used its records to learn that her husband used oxygen. The Equipment Company then sent a letter to Mr. Hatfield asking him to switch to the Equipment Company for his oxygen needs. Subsequently, a Hospital home health nurse visited the Hatfields and told Mrs. Hatfield "that since [she] was an employee of the Hospital, [she] should support the Hospital's medical equipment company." Mrs. Hatfield opined, therefore, that her employment with the Hospital was used unfairly in an effort to cause her husband to do business with the Equipment Company.

In none of these affidavits or other material submitted by M & M is there any evidence of coercion by the Hospital. There is nothing to suggest that the patients were threatened or would have been subject to adverse action if they had chosen another DME supplier. Also, it appears that most of these patients had done business in the past with M & M and, therefore, knew that there were sources of DME other than the Equipment Company. There is no evidence that patients were advised that they could not go elsewhere for DME.

Having failed to establish specific intent to monopolize the DME market or any predatory conduct by either of the Defendants, the Plaintiff has failed to raise a question of fact as to its attempt to monopolize, or leveraging, claim.

C. Conspiracy to monopolize.

The Plaintiff has alleged not only a conspiracy in restraint of trade, but also a conspiracy to monopolize by the Defendants. For the reasons the Plaintiff cannot, as a matter of law, prevail on its Section 1 claim, its conspiracy to monopolize claim must also fail.

III. Clayton Act

M & M has also asserted a claim of exclusive dealing in violation of Section 3 of the Clayton Act, which provides in pertinent part as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for use, consumption or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The Plaintiff alleges that there was such an agreement between the Defendants. The Defendants contend that the Plaintiff can prove no such agreement in this case because it has not alleged that the patients or individual users were party to the arrangement, but rather has alleged that an agreement existed between the Hospital and the Equipment Company.

Initially, it appears to the Court that M & M's exclusive dealing claim is functionally indistinguishable from its Sherman Act Section 1 claim and that the considerations leading to the demise of the Section 1 claim likewise should dictate dismissal of the exclusive dealing claim.

The Plaintiff argues, however, that the Hospital, through its personnel, stands in the shoes of its patients as the "true economic decision-maker" in selecting DME suppliers. Such a theory has been recognized in Sherman Act Section 1 cases. *See, e.g., Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1354 (7th Cir. 1982). Neither this nor the other cases cited by the Plaintiff, however, involve arrangements between related corporate entities.

In a case such as this, involving a corporation and its wholly owned subsidiary, the true economic decision maker argument will not work. If an agreement between the Equipment Company and the Hospital, on behalf of its patients, that DME be obtained only from the Equipment Company could form the basis of an antitrust violation, then the Hospital would also be in violation of federal anti-trust laws each time it provided medicines, bandages, or other medical supplies from its own stock rather than allowing the patient to shop around for his or her own materials.[2] Section 3 of the Clayton Act condemns only joint activity. M & M's argument that the Hospital was the true economic decision maker in relation to its Section 3 claims, must fail inasmuch as the conduct complained of is nothing more than unilateral conduct by the

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[2] These examples, of course, are analogous only to the extent that the product market in this case includes DME used within the Hospital itself. The Court notes that M & M has submitted the affidavit of Dr. Osborne who indicated that while she enjoyed privileges at Pleasant Valley Hospital, after the Equipment Company entered the DME market, she was not permitted to obtain infant monitors from any other source.

The Court notes, too, that as to the market for DME outside the Hospital, M & M has presented some evidence through affidavits that in some instances a DME supplier was selected for patients by Hospital personnel without consultation with the patients. Even assuming that Hospital personnel so acted, without more, this evidence hardly supports the requirement of a condition, agreement or understanding not to deal with the Equipment Company's competitors.

Hospital and its wholly owned subsidiary. *See generally Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. at 771-74, 104 S.Ct. at 2741-43.

For the foregoing reasons, the Court concludes that the Defendants, as between themselves, cannot violate Section 3 of the Clayton Act.

Based on the foregoing, the Court finds that there are no genuine issues of material fact as to the Plaintiff's antitrust claims and grants summary judgment in favor of the Defendants on those claims. Inasmuch as those federal claims formed the only basis of the Court's jurisdiction herein, the Court dismisses the pendent tortious interference claim without prejudice.

APPENDIX D

Filed February 14, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3100
CA-88-1099-A

M&M MEDICAL SUPPLIES AND SERVICE, INCORPORATED,
Plaintiff-Appellant

v.

PLEASANT VALLEY HOSPITAL, INCORPORATED; PLEASANT VALLEY HOME MEDICAL EQUIPMENT, INCORPORATED,
Defendants-Appellees

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that the rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the April 6-10, 1992 session of Court. Within ten days of the date of this order, 8 additional copies of appellant's brief and supplemental brief, and 8 additional copies of appellees' brief and

supplemental brief shall be filed. Appellant shall also file 8 copies of its reply brief.

Appellees will file 13 additional copies of the joint appendix.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX E

Filed: January 22, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3100
(CA-88-1099-A)

M&M MEDICAL SUPPLIES AND SERVICE, INCORPORATED,
Plaintiff-Appellant,

versus

PLEASANT VALLEY HOSPITAL, INCORPORATED; PLEASANT VALLEY HOME MEDICAL EQUIPMENT, INCORPORATED,
Defendants-Appellees.

ORDER

The appellees' petition for rehearing in banc was submitted to this Court. In a requested poll of the Court, Chief Judge Ervin, Judge Widener, Judge Phillips, Judge Murnaghan, Judge Wilkinson, Judge Wilkins, Judge Niemeyer, Judge Hamilton, Judge Luttig, and Judge Williams voted against again rehearing the case in banc. Judge Russell and Judge Hall voted for rehearing in banc. As a majority of the judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing in banc is denied.

Entered at the direction of Judge Butzner.

For the Court

/s/ Bert M. Montague
Clerk

Supreme Court, U.S.
FILED
MAY 18 1993
OFFICE OF THE CLERK

No. 92-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PLEASANT VALLEY HOSPITAL, INC., and
PLEASANT VALLEY HOME MEDICAL
EQUIPMENT, INC.,
Petitioners,

v.

M & M MEDICAL SUPPLIES AND SERVICE, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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43pp

QUESTIONS PRESENTED

Respondent is not satisfied with Petitioners' statement of the Questions Presented.

WHETHER the filing of a "Petition for Rehearing en banc" of a Circuit Court of Appeals' in banc decision tolls the time for filing of a Petition for Writ of Certiorari.

WHETHER, to withstand summary judgment under Rule 56(e) of the Federal Rules of Civil Procedure, an expert's affidavit must contain not only the specific facts and reasoning supporting the expert's conclusions, but also the underlying data supporting the facts.

WHETHER, in an attempt to monopolize case under section 2 of the Sherman Act, compelling evidence of an intent to monopolize or of anti-competitive conduct reduces the level of market share that need be shown to establish a dangerous probability of success of monopolization.

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ADDITIONAL PERTINENT RULE

Rule 705 of the Federal Rules of Evidence, which provides that:

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying data on cross-examination.

Respondent disputes that Rule 703 of the Federal Rules of Evidence is involved in this case.

JURISDICTION

Respondent disputes that this Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1) in that petitioners have failed to file a timely Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On August 9, 1988, respondent filed a seven count Complaint against petitioners in the United States District Court for the Southern District of West Virginia, Parkersburg Division. The Complaint challenged certain business practices of the petitioners with respect to the provision of durable medical equipment (DME) to Pleasant Valley Hospital's home-bound patients.

Respondent began leasing and selling DME to Mason County, West Virginia patients in 1980. The primary referral source for DME business was Pleasant Valley Hospital, where patients were often discharged with the need for continued convalescence in the home. In November, 1985, Pleasant Valley Hospital started its own for-profit corporation for the provision of DME. Immediately after the hospital's DME company entered the market, respondent received virtually no new DME

business from hospital patients. Respondent's monthly revenues dropped from approximately $35,000 to $8,000.

The methods by which petitioners captured the market formed the basis of the antitrust complaint. First, DME was ordered for patients by hospital personnel without consulting the patient to see if they had a preference for a DME company. Affidavits of Reed Sturgeon (J.A. 145), Karen Broadwater (J.A. 143-44), Jean Taylor (J.A. 135-36), Karen Sue Krebs (J.A. 148-49), and Deposition of Annabelle Castle, pp. 5-7. This had the effect of eliminating any chance respondent may have had to retain any of its previous customers and to preempt the possibility of new business. Second, petitioners caused at least one customer to switch from respondent to the hospital's DME company by unfairly utilizing the fact that the patient's wife worked for the hospital. Affidavit of Maxine Hatfield (J.A. 137-38). Third, the hospital interfered with the medical judgment of its physicians in the treatment of patients in order to secure more business for the hospital DME company. Affidavit of Dr. Georgianna Burns Osborne (J.A. 130-32). Hospital discharge personnel reported to respondent's president that there was nothing that could be done to let any DME business out of the hospital's closed system -- their hands were tied. Deposition of Michael Marnhout, pp. 51-55, 56-61.

Dr. Roger Blair, a noted antitrust scholar, submitted an affidavit in this case concluding that Mason County, West Virginia was the relevant geographic market for purposes of antitrust analysis. (J.A. 150-163). Dr. Blair based his opinion, in part, on a review of the patient origin data provided by petitioners. (J.A. 25-31). Dr. Blair reported his analysis in the affidavit as follows:

> The patient origin data strongly suggest that Mason County residents rely predominantly upon Mason County suppliers for their hospital and medical equipment needs. Some overlap into the neighboring Ohio counties is to be expected but does not change the unmistakable conclusion that Mason County represents a distinct geographic market for antitrust analysis.

In spite of the fact that Holzer Medical Center, across the river in Ohio, was a much more sophisticated facility with more specialized physicians, Pleasant Valley Hospital still provided hospital services for over 65% of Mason County residents. Part of this is explained by the fact that the Mason County physicians only have staff privileges at Pleasant Valley Hospital. Moreover, part of the out migration to Holzer Medical Center is explained by the fact that Pleasant Valley Hospital simply cannot provide some of the services needed by Mason County residents.

The market power of the hospital's DME company was derived directly from the company's pricing behavior. Based upon his study of these prices, Dr. Blair stated the following in his affidavit:

> Pleasant Valley Home Medical Equipment is exercising monopoly power -- i.e. the power to raise price or exclude competition. Pleasant Valley Home Medical Equipment has held its prices above those charged by M & M Supplies and Services on numerous articles of DME for over a year without losing significant numbers of customer[s]. This is a direct measure of monopoly power.

The trial court rejected Dr. Blair's affidavit because "he set forth no facts to support these opinions, nor has he provided facts to support the Plaintiff's contention that the Defendant Equipment Company has monopoly power in

the DME market". Appendix C to Petition at 49a. As to the hospital's company's control over pricing, the court found Dr. Blair's affidavit deficient because it "cited no specific examples of such conduct". Id.

The appellate history of this case is stated accurately in the Petition. Petition at 6-9.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction to consider the Petition for Writ of Certiorari because it was filed more than 90 days after the decision of the Fourth Circuit Court of Appeals sitting in banc. Pursuant to Rule 13.4 of this Court, a suggestion for rehearing in banc does not toll the time for filing a petition for writ of certiorari.

2. The Fourth Circuit applied the proper standard in upholding the sufficiency of Dr. Blair's affidavit. The court, consistent with other circuits, properly held that an expert's affidavit must contain the facts and reasoning supporting the expert's conclusions but need not contain all the underlying data.

3. There was never a question in this case that the facts Dr. Blair relied upon were not of a type reasonably relied upon by economic experts. Petitioners are attempting to inject an issue at this stage of the proceedings which was not considered or ruled upon by the trial court, the panel of the Fourth Circuit or the Fourth Circuit sitting in banc. This question is not properly before the Court.

4. The Fourth Circuit's opinion regarding the elements of an attempt to monopolize claim is entirely consistent with *Spectrum Sports* in that the court specifically required a showing of dangerous probability of success irrespective of the evidence of intent and predatory

conduct. The comment made by the Court that compelling evidence of intent to monopolize or of anticompetitive conduct may reduce the level of market share that need be shown is a correct statement of the law albeit unrelated to the issues in this case.

5. The Fourth Circuit expressed no opinion on the question of whether monopoly leveraging is a cognizable cause of action under Section 2 of the Sherman Act. Review of this issue, in the context of this case, would result in an advisory opinion.

ARGUMENT - REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Petition for Writ of Certiorari is untimely in that it was not filed within 90 days of the decision of the Fourth Circuit Court of Appeals sitting in banc.

The decision of the Fourth Circuit Court of Appeals, sitting in banc, was rendered in this case on December 9, 1992. On December 22, 1992, the Petitioners filed a document with the Fourth Circuit entitled "Petition for Rehearing en banc". Appendix A. On January 20, 1993, the Fourth Circuit amended the December 9, 1992 opinion correcting some typographical errors appearing in the original decision. Appendix B. On January 22, 1993, the Court entered its Order denying the "Petition for Rehearing en banc" and reported the results of a poll taken of all eligible, active and participating judges. Appendix E to Petition for Writ of Certiorari. Judge Butzner, Senior Circuit Judge, was not polled. The Petition for Writ of Certiorari was filed on April 22, 1993: (1) 134 days from December 9, 1992; (2) 92 days from January 20, 1993; and (3) 90 days from January 22, 1993.

Rule 13.1 of this Court requires a Petition for Writ of Certiorari to be filed within 90 days of the entry of judgment of the court of appeals. Rule 13.4 provides for tolling of the time for filing under certain circumstances:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule. (emphasis supplied)

There can be no question that if the document filed on December 22, 1992 by petitioner in this case was a suggestion for a rehearing in banc, the Petition for Writ of Certiorari was untimely.

There is no provision in the Federal Rules of Appellate Procedure for a Petition for Rehearing in banc. A party may petition for rehearing before a panel of the United States court of appeals under Rule 40, file a suggestion for a rehearing in banc under Rule 35, or do both, separately or together. *Missouri v. Jenkins*, 495 U.S. 33, 47 (1990). It is apparent from the procedure followed by the Fourth Circuit that the Court recognized and treated the petitioner's "Petition for Rehearing en banc" in the only manner recognized by the Federal Rules of Appellate Procedure, i.e., as a suggestion for a rehearing in banc.

The first clear indication of how the Fourth Circuit viewed the "Petition for Rehearing en banc" is that Judge Butzner, the only senior circuit judge on the in banc panel, was not permitted to vote on whether to rehear the case. Rule 35(a) of the Federal Rules of Appellate Procedure mandates this action:

> A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc.

Rule 35(b) of the Rules of Fourth Circuit states, in part:

> A majority, but no fewer than four, of all eligible, active and participating judges may grant a hearing or rehearing in banc.

Because Judge Butzner was on senior status, he was not in regular active service and, therefore, pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure and Rule 35(b) of the Rules of the Fourth Circuit, was not permitted to participate in the vote. It would not have been appropriate to exclude Judge Butzner had the "Petition for Rehearing en banc" been deemed a Rule 40 petition.

The Fourth Circuit's Order denying the "Petition for Rehearing en banc" also reflected the vote of each participating judge. This procedure comes directly from the Fourth Circuit's Rule 35(b) procedure.

> If a poll is requested, the order will reflect the vote of each participating judge.

No similar provision exists under the Fourth Circuit's Rule 40 procedure.

Notwithstanding how the petitioner styled or denominated its "Petition for Rehearing en banc" filed on December 22, 1992, it is clear that it was in fact a suggestion for rehearing in banc pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure. As such it did not toll the deadline for filing the petition for writ of certiorari in this Court. Therefore, petitioner's petition is untimely irrespective of whether the Fourth Circuit's decision is deemed to have been entered on December 9, 1992 (the reported date of the decision) or on January 20, 1993 (the date of the amendment of the decision).

II. The Rule 56(e) Standard Applied by the Fourth Circuit to Dr. Blair's Affidavit Does Not Conflict with the Decisions from Other Circuits.

Petitioners claim that "the decisions cited by the en banc majority are inconsistent with a number of other Courts of Appeals' decisions". Petition at 11. However, review of the cases cited by petitioners reveals harmony rather than discord among the circuits on the issue of the sufficiency of an expert's affidavit. The opinion of Judge Butzner in the instant case explains in some detail how the Courts of Appeal have consistently treated the possible tension between Rule 56(e) of the Federal Rules of Civil Procedure and Rule 705 of the Federal Rules of Evidence.

First, it is clear that "[A]n expert's affidavit that is wholly conclusory and devoid of reasoning does not comply with Fed.R.Civ.P. 56(e)" and that "[T]he deficiencies in such an affidavit are not remedied by resort to the Federal Rules of Evidence". Appendix A to Petition at 8a. In support of these propositions the in banc majority cited the following cases: *Military Services Realty, Inc. v. Realty Consultants of Virginia, Ltd.*, 823 F.2d 829, 832 (4th Cir. 1987); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989); *Evers v. General Motors*

Corp., 770 F.2d 984, 986 (11th Cir. 1985); *United States v. Various Slot Machines*, 658 F.2d 697, 699-701 (9th Cir. 1981); and *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977)[1]. Id.

However, numerous courts have held, consistent with the Fourth Circuit's decision herein, that a clear distinction exists between an affidavit wholly devoid of facts and reasoning and one which contains facts and reasoning but which omits the underlying data. *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316-18 (9th Cir. 1985); *Monks v. General Electric Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990); *Ambrosini v. Laborranque*, 966 F.2d 1464, 1470-71 (D.C. Cir. 1992); *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980). The in banc majority opinion easily harmonized the latter cases with the "wholly conclusory" cases as follows:

> But the primacy of Fed.R.Civ.P. 56(e) does not exclude all applications of the Federal Rules of Evidence pertaining to an expert's opinion in summary judgment proceedings. In view of Fed.R.Evid. 1101(b), which makes the Federal Rules of Evidence apply generally to all civil actions, Fed.R.Evid. 705 and Fed.R.Civ.P. 56(e) must be reconciled. Federal Rule of Evidence 705 permits an expert to give reasons for an opinion "without prior disclosure of the underlying facts or data unless the court requires otherwise". As previously

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[1] Each of these cases were cited by petitioners in their motion for rehearing as being in conflict with the panel opinion. Petitioners now cite the following three cases which were never cited to the Fourth Circuit: *Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307 n.4 (5th Cir. 1990); *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579-80 (11th Cir. 1985); and *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n.*, 745 F.2d 248, 261-62 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

> noted, we believe that Fed.R.Civ.P. 56(e) trumps this rule of evidence with respect to the disclosure of facts in a summary judgment proceeding. Nevertheless, Fed.R.Civ.P. 56(e) and Fed.R.Evid. 705 can be reconciled with respect to data supporting the facts. Neither rule requires prior disclosure of the supporting data -- in this case patients' addresses and DME prices. Furthermore, both rules contemplate supplementation of the expert's affidavit to disclose supporting data if the court deems the disclosure to be necessary before it decides the motion for summary judgment.

Appendix A to Petition at 9a. Thus, there is nothing novel or incongruent with the Fourth Circuit's approach. It merely ruled that an expert must state the supporting facts and reasoning in the affidavit but need not include the entire data base. None of the cases cited by petitioners would hold differently.

Merit Motors involved an antitrust challenge by a Chrysler dealer to Chrysler's special fleet sales programs. The plaintiff automobile dealers proffered Professor Richard Staelin as an expert to prove how the fleet sales programs injured competition. Chrysler took the expert's deposition and in such deposition Professor Staelin gave the opinion, based solely on "standard economic theory", that the "inevitable effects" of Chrysler's programs was to injure plaintiffs and competition. Professor Staelin admitted, in his deposition, that he was unfamiliar with the record in the case and that his conclusions were bases only on economic theory. In fact, many of Professor Staelin's assumptions were entirely contradicted by record evidence. The District Court dismissed Professor Staelin's theory "since his opinion is based solely on speculations and hypotheses and is unsubstantiated by any evidence in the record". Id. at 672, quoting from 417 F.Supp. at 272. The Fifth Circuit affirmed stating that Rule 703 cannot prevent

a court from granting summary judgment against a party who relies solely on an "expert's opinion that has no more basis in or out of the record than Staelin's theoretical speculation. . . ." Id. at 673. Thus, the expert's affidavit was deficient in that it failed to state the facts and reasoning underlying his conclusions.

Evers involved a claim by the plaintiff that Chrysler's failure to provide air bags in their automobiles rendered such automobiles defective and unreasonably dangerous. Two days prior to the summary judgment hearing, plaintiff submitted the affidavit of Carl F. Thelin which concluded that an air bag restraint system would probably have reduced the severity of, or prevented plaintiff's injuries. The affidavit contained no explanation or facts to support this conclusion. Moreover, the affidavit was directly contradictory to plaintiff's other expert who testified in deposition that air bags are not designed to provide protection in a side impact collision (which this was). The Eleventh Circuit rejected the affidavit as being merely conclusory. "There is no specific mention of how an 'air bag' would have aided in a side-impact collision". Id. at 986-87. Again, the affidavit was defective because it failed to state the facts and reasoning underlying the expert's conclusions.

Mid-State is yet another example of an expert stating bare legal conclusions without a scintilla of factual predicate or economic reasoning. The issue involved was whether the defendant bank's loan practice, which included a locked box or blocked account, was a violation of an implied covenant of good faith and fair dealing. The bank explained that the blocked account practice was necessary as additional security for outstanding loans to the customer whose checking account was blocked in the event of a loan payment default. In opposition to this testimony, the plaintiff offered the affidavit of Dr. William R. Bryan who

concluded that the blocked account was (1) not necessary, (2) not appropriate, (3) contrary to good faith and fair dealing, and (4) the cause of plaintiff's demise. Nowhere in the affidavit did the economist give any basis or reasoning process which lead to his counter-intuitive conclusions. The trial court rejected the affidavit and the Seventh Circuit affirmed stating,

> Rule 705 of the Federal Rules of Evidence allows experts to present naked opinions. Admissibility does not imply utility. Professor Bryan presented nothing but conclusions -- no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected. Rule 56(e) of the Rules of Civil Procedure provides that affidavits supporting and opposing motions for summary judgment must do more than present something that will be admissible in evidence. They shall "set forth facts" and by implication in the case of experts (who are not "fact witnesses") a process of reasoning beginning from a firm foundation.

Id. at 1339.

Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248 (3d Cir. 1984), is another case of an expert relying exclusively on "economic theory" and surmise in order to render expert opinions. The affidavit of Dr. Comanor at issue was replete with statements inconsistent with record evidence and was based almost entirely on economic reasoning rather than any facts specific to the case. Again, the court correctly rejected the affidavit as entirely conclusory.

Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir. 1990), rejected the affidavits of two doctors primarily because the sources of the experts' opinions were examination reports which were shown to be replete with "so many obvious errors as to be of no value to the trier of

fact". Id. at 307. Significantly, the *Slaughter* court held that its decision was in no way inconsistent with the Ninth Circuit's decision in *Bulthuis v. Rexall Corp.*, 789 F.2d 1315. *See*, 919 F.2d at 307 n.4.

Similarly, in *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569 (11th Cir. 1985), the expert's affidavit was based entirely on the unreliable lay testimony of the client. The court held that an economist would not reasonably rely on such data in formulating opinions.

The rule announced by the Fourth Circuit in the instant case falls squarely within the holdings of the cases which petitioners claim to be in conflict.

> In sum, we reiterate that an expert's conclusory affidavit lacking facts does not satisfy the requirements of Fed.R.Civ.P. 56(e). In contrast, an affidavit that states facts on which the expert bases an opinion satisfies Fed.R.Civ.P. 56(e) even though the expert does not attach the data supporting the facts. If need be, the court, acting pursuant to Fed.R.Civ.P. 56(e) and Fed.R.Evid. 705, can require the expert to furnish the supporting data.

Appendix A to Petition at 10a. Accordingly, there is no basis for this Court to grant the Petition for Writ of Certiorari premised on an alleged conflict among the Circuit Courts of Appeal.

III. Whether Dr. Blair's Affidavit Relied on Facts of a Type Reasonably Relied Upon by Economic Experts Was Never an Issue in this Case

Petitioners fault the in banc majority opinion in this case because it "failed to address the central deficiency of Dr. Blair's affidavit: its failure to rely on facts of a type

reasonably relied upon by economic experts". Petition at 13. However, this is the first time that this issue has arisen in the five year history of this case. Petitioners never mentioned it in their briefs to the trial court, in their original brief to the Court of Appeals, in their brief in support of their petition for rehearing of the panel opinion, in their brief in support of their "Petition for Rehearing en banc", in any of their supplemental briefs, or in any of their oral arguments. Likewise, none of the courts which have considered this case have made any mention of the alleged "central deficiency" of Dr. Blair's affidavit. This argument is nothing more than a classic afterthought.

The primary reason that the issue has never arisen prior to this time is that the district court's decision that Dr. Blair's affidavit "set forth no facts to support these opinions". Appendix C to Petition at 49a. If the affidavit set forth no facts then it would seem illogical to then say that the facts set forth are not of the type reasonably relied upon by economic experts. This simply was not part of the decision which was appealed and did not come before either the panel or the Fourth Circuit sitting in banc. It is entirely inappropriate to raise an issue at this junction of the proceedings which has never been raised before. *Weinberger v. Rossi*, 456 U.S. 25, 36 n. 18 (1982); *Federal Trade Commission v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960).

IV. The Fourth Circuit's Opinion is not in Conflict with *Spectrum Sports* in that the Court Did Require a Showing of a Dangerous Probability of Monopolization Independent of Evidence of a Specific Intent to Monopolize.

Petitioners claim that the in banc majority opinion in this case is inconsistent with the Court's recent opinion in

Spectrum Sports, Inc. v. McQuillan, 113 S.Ct. 884 (1993), with respect to the requirement of a showing of dangerous probability of monopolization in an attempt to monopolize case. However, a review of the two opinions clearly demonstrates that the Fourth Circuit's treatment of the elements of an attempt to monopolize is well within the parameters articulated by this Court.

Spectrum Sports was a direct challenge to a rule which had developed in isolation in the Ninth Circuit. The rule held that evidence of a dangerous probability of monopolization was not necessary in an attempt to monopolize case where there was evidence of unfair or predatory conduct. This rule was out of step with the accepted jurisprudence in the other circuit courts of appeal. This Court held that "petitioners may not be liable for attempted monopolization under section 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." Id. at 892.

The in banc majority opinion in the instant case articulated the elements of an attempt to monopolize under § 2 of the Sherman Act as follows:

(1) a specific intent to monopolize the relevant market;

(2) predatory or anticompetitive acts in furtherance of the intent; and

(3) a dangerous probability of success.

Appendix A to Petition at 11a. "The third element of attempted monopolization, a dangerous probability of success, must be shown to be substantial and real". Id. at 15a. The opinion went on to state that,

> Market share is relevant, but its relevance is tempered by evidence of the other two elements of the claim. Compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown.

Id. Nowhere in the opinion did the court state that the third element of the offense, dangerous probability, is unnecessary to prove. Quite the contrary.

Petitioners misread the Fourth Circuit's opinion when they state that "according to the standard established by the en banc majority, the quantum of evidence necessary to establish a dangerous probability of monopolization is dependent on the type and extent of the evidence provided regarding the other two required elements. . .". Petition at 22. In fact, the court did not state that the quantum of evidence of dangerous probability was dependent on the proof adduced on the other elements. The court merely stated that the market share of the defendant need not be proven to be as high when there is compelling evidence of intent or predatory conduct. The court went on to discuss other factors which may effect the probability of successful monopolization, including the trend in market share, ease of entry and exclusionary conduct without the justification of efficiency. Each of these factors may effect the likelihood of success of the attempt to monopolize. Nowhere in the opinion did the court retreat from its pronouncement that a dangerous probability must be shown to be substantial and real.

Moreover, the Fourth Circuit's market share discussion was *obiter dictum*, as applied to the instant case. Here there was direct evidence that Pleasant Valley Home Medical Equipment, Inc. was actually exercising monopoly power. Dr. Blair's affidavit stated,

> Pleasant Valley Home Medical Equipment is exercising monopoly power -- i.e., the power to raise price or exclude competition. Pleasant Valley Home Medical Equipment has held its prices above those charged by M & M Supplies and Services on numerous articles of DME for over a year without losing significant numbers of customer[s]. This is a direct measure of monopoly power.

Petitioners correctly point out that market share is but a surrogate or proxy for the existence of monopoly or market power. Petition at 22. And although monopoly power may be inferred from market share information[2], "the ultimate consideration in such a [monopoly power] determination is whether the defendants control the price and competition in the market. . .". *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 380 (1956). Evidence of the actual existence and exercise of monopoly power obviously satisfies the dangerous probability of success element of attempted monopolization.

V. The Fourth Circuit Did Not Reach the Question of Whether Monopoly Leveraging is a Cause of Action Distinct from Attempted Monopolization.

Petitioners ask this Court to review the Fourth Circuit's opinion on the question of the existence of a cause of action under section 2 of the Sherman Act denominated as monopoly leveraging. The Fourth Circuit, however, expressed no opinion on this issue.

> In *Advanced Health-Care*, 910 F.2d at 149-50 & n. 17, we reversed the dismissal of a leveraging claim, while expressly reserving judgment until the advent of "a case in which the issue is squarely presented". Again, we express no opinion on this question but assume for

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[2] *United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).*

> purposes of remand that monopoly leveraging is a separate violation of section 2. There will be time enough to evaluate the validity of this assumption after the parties have developed a factual record.

Appendix A to Petition at 16a (emphasis added). In light of the fact that the Fourth Circuit has yet to rule on this question, any opinion by this Court in the context of this case would clearly be advisory.

CONCLUSION

There is no basis for this Court to grant the Petition for Writ of Certiorari in this case. First, the Court lacks jurisdiction because the petition was untimely. Second, the Fourth Circuit's opinion with respect to the sufficiency of an expert's affidavit is in harmony with the other Circuits which have addressed this question. Third, the Rule 703, Fed. R. Evid. argument made by petitioners has never been previously raised in this case. Fourth, the elements of attempted monopolization were clearly and accurately articulated and applied by the Fourth Circuit. And, finally, the Fourth Circuit expressed no opinion on the issue of monopoly leveraging as a cognizable cause of action under the Sherman Act. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

90-3100

M & M MEDICAL SUPPLIES AND SERVICE, INC.
Plaintiff-Appellant,
v.

PLEASANT VALLEY HOSPITAL, INC. and
PLEASANT VALLEY HOME MEDICAL EQUIPMENT, INC.
Defendants-Appellees.

PETITION FOR REHEARING EN BANC

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INTRODUCTION

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and IOP 40.1, the Petitioner-Appellees -- Pleasant Valley Hospital ("Hospital") and Pleasant Valley Home Medical Equipment Company ("Equipment Company") -- respectfully petition the court for a rehearing concerning the court's opinion dated December 9, 1992.

In the opinion of Counsel:

1. The opinion overlooks the material facts that M&M Medical Supplies and Service, Inc. ("M & M") does not meet the test established by the majority for "attempted monopolization."

2. The opinion overlooks the following material points of law:

   a. An expert-is required to rely only on facts relied upon by experts in the field.

   b. A trial court has discretion to refuse to permit supplementation of the experts' affidavits.

   c. The affidavit submitted by M & M's expert did not meet an economically accepted definition of market definition.

   d. The affidavit submitted by M & M's expert did not establish monopoly power by an economically acceptable methodology.

   e. M & M has not established antitrust injury.

3. The opinion is in conflict with at least six decisions of other Courts of Appeals which are not addressed in the opinion.[1]

BACKGROUND

The only evidence offered by M & M regarding its allegations that the appropriate market for DME services was limited to Mason County, West Virginia, and that the Equipment Company had monopoly power in that geographic market was an affidavit containing the professional opinions of M & M's expert economist, Dr. Roger Blair. Chief Judge Hayden considered Dr. Blair's affidavit, and found it insufficient, holding that it did not meet the requirement of Rule 56(e), that "an expert's affidavit must set forth specific facts showing that there is a genuine issue for trial." *M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 738 F. Supp. 1017, 1020 (S.D.W. Va. 1990), citing Fed. R. Civ. P. 56 (e). Judge Hayden also noted that pursuant to Rule 703 of the Federal Rules of Evidence, experts may rely on

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[1] Although cited by the Petitioner, the majority en banc opinion failed to address several United States Court of Appeals decisions determinative of the issues in this case, including: *Alaska Airlines, Inc., v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992); *Fineman, The Indus. Network Sys. Inc. v. Armstrong World Indus., Inc.*, No. 91-5613, 1992 WL 309215, 1992-2 Trade Cas. (CCH) ¶ 70,010 (3d Cir. Oct. 28, 1992); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 494 (3d Cir.), *cert denied*, 113 S. Ct. 196 (1992); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1110 (5th Cir. 1991), *cert denied*, 112 S. Ct. 1280 (1992); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1129-30 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 320 (1992); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991).

inadmissible facts so long as they are of the type "reasonably relied on by experts in that field."

In its en banc decision this Court's majority reversed, holding that Dr. Blair had omitted from his affidavit only "the underlying data supporting his facts," rather than the facts themselves. Slip Op. at 7.

THE EN BANC MAJORITY FAILED TO REQUIRE DR. BLAIR'S AFFIDAVIT TO MEET THE PROPER STANDARD FOR EXPERT OPINIONS

The en banc majority failed to address the central deficiency of Dr. Blair's affidavit. As an expert, Dr. Blair was required to support his expert opinions by reliance on facts of a type relied on by economic experts. *See Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1110 (5th Cir. 1991), *cert denied*, 112 S. Ct. 1280 (1992); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1129-30 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 320 (1992).[2]

This court has, itself, required "a substantial acceptance in the relevant discipline" before a scientific hypothesis can be considered as probative evidence. *United States v. Gould*, 741 F.2d 45, 49 (4th Cir. 1984).

> The determination whether proffered scientific evidence has the requisite 'tendency' to prove the existence or nonexistence of the consequential fact in issue must certainly contemplate a determination . . . that the generalized proposition upon which it is based is, as a matter of judicial notice, manifestly false . . . . From this, it is but an obvious step to determining that the 'generalized proposition' has simply not been shown by the proponent of the evidence to have the

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[2] Both cases were cited by Petitioner in its initial Suggestion for Rehearing En Banc, but were not discussed by the Majority in its opinion.

requisite validity to stand as the major premise of the relevant syllogism.

Id. at n.2. Summary judgment cannot be forestalled by reliance on an expert affidavit premised on economic analysis that is without acceptance in the economic community. Such an affidavit is without "foundational relevance." *Id.*

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY NOT PERMITTING DR. BLAIR TO SUPPLEMENT HIS AFFIDAVIT

The majority opinion holds that "F.R.C.P. 56(e) does not mandate exclusion of an affidavit for the lack of the underlying data supporting an affiant's assertion of facts." Slip. Op. at 7. But neither does the rule preclude such exclusion (or rejection). Indeed, the language of the Rule is explicitly permissive and discretion.[3] It states that "the court may permit affidavits to be supplemented. . . ." Fed.R.Civ.P. 56(e) (emphasis added); see *Christophersen* at 1109.[4] Moreover, in an analogous situation regarding the admissibility of expert opinion, this Court itself has held

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[3] The need for discretion is underscored by the facts in this case. Specifically, petitioner served M & M with an interrogatory inquiring about its experts' opinions, so that discovery deposition could be scheduled. M & M was unresponsive to the interrogatory, but promised to supplement its response at the time its expert had formulated his opinions. This was not done prior to the time discovery was closed. Thus, Dr. Blair's affidavit was the first (and only) notification of Dr. Blair's opinions ever received by petitioner. Under these circumstances, it can hardly be said that the trial court abused its discretion in failing to permit M & M to supplement the affidavit of its economic expert.

[4] Again, *Christophersen* was not discussed by the majority, although it was prominently displayed in Petitioner-Appellees' initial suggestion for rehearing en banc.

that the decision "is normally within the discretion of the trial judge." *United States v. Baller*, 519 F.2d 463, 466 (4th Cir.) (Butzner, J.), *cert. denied*, 423 U.S. 1019 (1975). Where it is clear from the face of an affidavit that the facts relied upon by the expert are not "of a type reasonably relied on by experts in the field" to support the expert's opinions, a trial court does not abuse its discretion by rejecting the affidavit without first permitting supplementation.[5]

There can be no doubt that the facts relied upon by Dr. Blair to support his opinions are not "of a type reasonably relied on by experts" in the field of economics.

DR. BLAIR'S MARKET DEFINITION METHODOLOGY WAS UNACCEPTABLE

In order to support his opinion that the Equipment Company monopolized the DME market, Dr. Blair was required to define a relevant geographic area for the DME market -- i.e., Mason County -- and to establish that the Equipment Company had monopoly power in that market. Plainly, there is no supportable factual basis in Dr. Blair's affidavit upon which an economic expert could properly opine that Mason County is the relevant geographic

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[5] In another closely analogous situation, the Third Circuit, sitting en banc, affirmed the district court's grant of summary judgment notwithstanding the existence of an affidavit from the plaintiff's economic expert who articulated the expert's opinion regarding the relevant market and stated that the defendant had market power in that market. *Town Sound*, 959 F.2d at 494. The court simply concluded that the experts' opinions did not comport with the appropriate economic analysis. *Id.*

market for DME.[6] Dr. Blair's market analysis is based on the so called Elzinga-Hogarty test, a commonly used economic methodology which defines the relevant geographic market on the basis of the extent of the "leakage" into the proposed geographic market area from outside the market and out of the proposed market area from inside. *U.S. v. Rockford, Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill 1989) *aff'd* 898 F.2d 127, (7th Cir.), *cert denied*, 111 S. Ct. 295 (1990) (discussion of Elzinga-Hogarty test); *In the Matter of Adventist Health Systems/West, and Ukiah Adventist Hospital*, FTC Docket No. 9234 (A.L.J. Parker, Dec. 9, 1992) (attached hereto) [sic]. Where the leakage under both measures is more than 25% economists reject the proposed geographic area as too small to be even a "weak" geographic market. *Rockford*, 717 F. Supp. at 1266-73; *Adventist Health System* at 12-15. In this connection, there was no way for Dr. Blair to plausibly assess the leakage out of Mason County for DME given his concession that he examined the customer origin data of only a single supplier (out of the five located in Mason County and the five more located in the two contiguous counties).[7] The geographic area in which a single market participant operates does not define the geographic market. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991). Nor did Dr. Blair's affidavit even claim that he analyzed the number (and/or percentage) of DME customers living outside of Mason County who obtained DME supplies within Mason County. Finally, Dr. Blair does not even

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[6] Dr. Blair's opinion that Mason County is also the relevant market for hospital services, which is essential to M & M's monopoly leveraging claim is subject to the same methodological deficiencies.

[7] The five (5) DME suppliers located in Mason County are Hockenberry Pharmacy North, Fruth's Pharmacy, Health-Aid Pharmacy, M & M and the Equipment Company. J.A., Vol. I, p. 13, fn 6; p. 41 and there are ten DME companies in the area. J.A., Vol. I, p. 40.

assert (nor could he) that the leakage both into and out of his proposed geographic market area is less than 25%.

DR. BLAIR'S AFFIDAVIT DID NOT ESTABLISH MONOPOLY POWER

Even if Dr. Blair's affidavit could support his opinion that the relevant geographic market for DME was Mason County, which he cannot, he offers no basis for his opinion that the Equipment Company is exercising "monopoly power" in the DME market in that geographic area.[8] The existence of market power ordinarily "is inferred from the seller's possession of a predominant share of the market." *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 112 S. Ct. 2072, 2081 (1992), citing *Jefferson Parrish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17 (1984). Of course, monopoly power requires something greater than market power. *Eastman Kodak*, 112 S. Ct. at 2090. Thus, in *Eastman Kodak* the Supreme Court found that defendant's control of more than 80% of the relevant market with no readily available substitutes was sufficient evidence of monopoly power to withstand a motion for summary judgment. *Eastman Kodak* at 2090. In contrast, Dr. Blair provided no calculation of the market share controlled by the Equipment Company within the single county market which he asserts, nor could he, given the fact that he examined the data of only one of the five DME dealers within Mason County.

Instead, to establish sufficient evidence of Equipment Company's monopoly power, Dr. Blair asserts the company has been able to hold "its prices above those charged by M & M on numerous articles of DME for over a year

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[8] Dr. Blair offered no opinion with respect to the Hospital's monopoly power in the market for hospital services. Such an opinion is an essential element in M & M's monopoly leveraging claim.

without losing significant numbers of customers."[9] Plainly, the mere fact that one supplier of a product is able to profitably charge more than another without losing customers does not, without more, demonstrate the existence of monopoly power.

As previously stated, monopoly power is something greater than market power which is defined as the power to profitably raise prices above competitive levels. *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984); *Jefferson Parrish*, 466 U.S. at 27 n.46; *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus.*, 889 F.2d 524, 528 n.8 (4th Cir. 1989). Yet, the mere fact that the Equipment Company is able to charge more than M & M does not establish that the Company's prices were higher than competitive levels. There are three other DME dealers within Mason County and it is certainly possible that all of them were charging more than either M & M or the Company. Dr. Blair's affidavit did not (and could not) say. Moreover, the facts in Dr. Blair's affidavit simply do not support a conclusion that the Equipment Company had monopoly power. Not all customers for DME are former patients of the Hospital. Plainly, petitioner has no way of controlling the DME choices of non-Hospital patients. Thus, if the Equipment Company's charges were raised above competitive levels, then the Company would lose non-Hospital based customers.[10] *Kodak* at 2083-84. Yet, Dr. Blair's affidavit states that the Equipment Company did not lose customers. The logical conclusion is that the Equipment Company's prices may have been above M & M's but they were not above competitive levels.

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[9] Significantly, Dr. Blair Does not claim the Equipment Company charged monopoly prices, nor could he.

[10] Of course, Petitioner's evidence suggest that, in fact, the Equipment Company's prices were low, or at least no higher than M & M's.

REQUIRING RIGOROUS STANDARDS FOR EXPERT TESTIMONY IS CRITICAL IN ANTITRUST CASES

The requirements of market definition and monopoly power are not merely ritualistic talismans requiring the incantation of magic words by a plaintiff's expert economist in order to withstand a motion for summary judgment. Rather, these requirements are imposed to ensure that a plaintiff's economic expert can demonstrate a sufficient danger of harm to consumers (rather than competitors) to justify an expensive, and time-consuming trial, where a plaintiff can prevail (and obtain treble damages and attorney's fees) simply because the jurors erroneously conclude that the goal of the antitrust laws is fairness to competitors, rather than injury to consumers.[11] *See* William G. Kopit and Robert W. McCann, *Old Wine in New Bottles*, 26 Wake Forest L. Rev. 3 (1991).

Permitting a plaintiff to withstand summary judgment by offering expert economic opinions not supported by sound analysis clearly and substantially increases a defendant's risk. If Dr. Blair's affidavit is legally sufficient then RCA could establish that Sony has monopoly power because some of its prices are higher; Lincoln could establish that Cadillac has monopoly power because some of its prices are higher; and Cadillac could establish that Mercedes has monopoly power because some of its prices are higher. That is not the law. "[T]he relevant inquiry is not whether prices have increased, but whether they have increased over the competitive level." *Drs. Steuer & Latham, P.A. v. Nat. Med. Enter., Inc.*, 672 F. Supp. 1489, 1502 (D.S.C. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988).

Indeed, if Dr. Blair's affidavit is legally sufficient to withstand a motion for summary judgment challenging a

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[11] For that reason it is often preferable, purely as a business decision, to settle rather than run the risk of an extensive award.

plaintiff's market definition and assertions of monopoly power, then plaintiffs will simply hire experts willing to opine generally that the defendant has been able to successfully charge more than the competing plaintiff. Moreover, experts are free to rely on facts provided by others, thus experts presumably would be able to rely on a general assertions made, not by the experts themselves, but by their clients in affidavits, or in verified complaints. Yet we Rule 56(e) provides that a party opposing a motion for summary judgment "may not rest upon the mere allegations . . . but . . . by affidavits or as otherwise provided in this Rule must set forth specific facts showing that there is a genuine issue for trial." *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 927 (4th Cir. 1990). An expert's opinions, not supported by facts relied upon by experts in the field should not be permitted to eviscerate that requirement.

M & M CANNOT SATISFY THE MAJORITY'S TEST FOR ESTABLISHING AN ATTEMPT TO MONOPOLIZE

The majority opinion correctly recognizes that M & M's attempted monopolization claim requires, as an essential element, a dangerous probability that the Equipment Company will monopolize the DME business in the relevant market.[12] The majority opinion goes on to enunciate a sliding scale for the minimum market share necessary to establish a dangerous probability of monopolization. Slip. Op. at 13.[13]

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[12] As previously noted, Dr. Blair's failure to use an acceptable economic methodology to establish that the relevant market for DME is limited to Mason County should, by itself, permit summary judgment.

[13] Unlike the Ninth Circuit, this circuit has never held that the elements of an attempt to monopolize may be inferred solely from predatory conduct. *See McQuillan*

(continued...)

The greater the proof that plaintiff has met the other two elements -- i.e., a specific intent to monopolize and predatory or anticompetitive acts in furtherance of the attempt -- the lower the market share required. *Id.* Nevertheless, it is clear that, regardless of the strength of the other two elements, the Equipment Company cannot satisfy dangerous probability position of the test. There is no evidence in the record to support the implicit assertion that the Equipment Company's market share in the DME market is more than the minimum required (30%), or any other percentage, even if Dr. Blair's affidavit is given full weight. Clearly, Dr. Blair offered no assessment of market share at all, nor could he, given his concession that he reviewed customer origin data of only one company (out of the five located in Mason County).[14] Because M & M cannot establish a dangerous probability of success under the test enunciated by the majority, summary judgment must be granted on M & M's attempted monopolization claim.

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[13](...continued)
v. Sorbothane, Inc., 907 F.2d 154 (Mem.) (9th Cir. 1990) *cert. granted sub. nom., Spectrum Sports, Inc. v. McQuillan*, 112 S. Ct. 1557 (1992). The Ninth Circuit's rule is currently being considered by the Supreme Court. *See Talking Yellow Pages, Inc. v. Pacific Telesis Group*, 972 F.2d 1343 (Mem.) (9th Cir.), *cert denied*, No. 92-615, 1992 WL 303339 (1992).

[14] Nor is there any other evidence in the record from which DME market share can be inferred.

MONOPOLY LEVERAGE IS NOT A SEPARATE CAUSE OF ACTION

The majority opinion also reinstated M & M's monopoly leveraging claim.[15] However, Judge Hayden correctly concluded that there is no separate claim for monopoly leveraging where, as here, the plaintiff cannot establish "a dangerous probability of monopolization." Since Judge Hayden's decision two other circuits have agreed with Judge Hayden's conclusion that monopoly leveraging does not exist as a separate cause of action. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992); *Fineman, The Indus. Network Sys., Inc. v. Armstrong World Indus., Inc.*, No. 91-5613, 1992 WL 309215, 1992-2 Trade Cas. (CCH) ¶ 70,010 (3d Cir. Oct. 28, 1992). Petitioner submits that these opinions, which were not discussed by the majority, are manifestly correct and should be followed in this circuit.

PLAINTIFF HAS NOT ESTABLISHED ANTITRUST INJURY THIS CASE

In *Advanced Health Care Serv., Inc. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990), this Court correctly held that liability under the antitrust laws requires a plaintiff to establish antitrust injury. Ordinarily, the fact that defendant's prices are higher than the plaintiff's cannot establish such injury. *Drs. Steuer & Latham*, 672 F. Supp. at 1502. Indeed, a competitor's higher prices are likely to benefit lower priced competitors. *Atlantic Richfield Co. v. USA Petroleum Co.*,

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[15] Monopoly leveraging depends on the Hospital's monopoly power in the hospital market. As previously discussed, Dr. Blair's affidavit does not use acceptable economic analysis to support his opinion that the relevant market for hospital services is limited to Mason County, and for that reason alone, the monopoly leveraging claim should be dismissed.

495 U.S. 328, 110 S. Ct. 1884, 1894-95 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986), *cert. denied*, 481 U.S. 1029 (1987). Clearly, consumers are free to switch to lower priced alternatives unless the challenged competitor has coerced (or forced) consumers to accept its product. But in this case, the majority acknowledges that the district court was correct in finding there was no coercion. Slip. Op. at 10. Any potential customer that cared enough to comparison shop and/or to request M & M products was free to do so.[16] Admittedly, some customers may not have compared prices or expressed their preference for M & M, but indifference does not create antitrust injury. *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 489-90 (3d Cir.), *cert. denied*, 113 S. Ct. 196 (1992) (en banc).[17]

The need for insuring that antitrust injury exists is even greater where, as here, the antitrust action is brought not by consumers, or surrogates of consumers, but by one competitor against another.[18] *Atlantic Richfield*, 110 S. Ct. at 1894-95 (1990); *Chicago Pro. Sports Ltd. v. NBA*, 961 F.2d 667, 670 (7th Cir.), *cert denied*, 113 S. Ct. 409 (1992).

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[16] The fact that initially petitioners may have set its prices below the plaintiff suggest that consumers can (and do) switch. The fact that petitioner retained customers when prices subsequently were raised suggest that the quality of goods and/or services were perceived as superior.

[17] This decision, which was submitted by the Petitioner-Appellees' supplemental authority was not discussed by the majority.

[18] Thus, the measure of damages requested by M & M relates to its loss of profits, not any injury to consumers. Consumers will not share in any damages obtained by M & M.

The antitrust laws were designed to protect consumers from suppliers, not to protect suppliers from each other.[19]

> Producers often complain about the effects of business rivals, which reduce their profits. Judicial relief from the real injuries caused by rivalry would harm consumers the antitrust laws are supposed to protect. The antitrust injury doctrine requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers.

Id. (citations omitted). In this case, the majority describes a lack of diligence, or assertiveness by customers, rather than coercion by the petitioner, as the proximate cause of any loss to M & M.[20]

It is also significant that it was M & M that first approached Petitioner and offered to sell. Only when Petitioner refused to meet M & M's price, did M & M bring this action.[21] If the antitrust laws are to achieve

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[19] M & M may argue that it is unlikely that individual consumers would bring an antitrust suit. But DME supplies are often insured, and large health insurance companies are certainly in the position to bring antitrust suits if they believe that they are being overcharged. *See Atlantic Richfield v. USA Petroleum Co.*, 495 U.S. 328, (1990); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984), *cert denied*, 471 U.S. 1029 (1985).

[20] The reference to the petitioner's insistence that in-hospital infant monitors be purchased from a particular source is hardly apposite. The Petitioner is legally responsible for the operation of all equipment used within the hospital and is certainly permitted to select (and purchase) the hospital equipment of its choice.

[21] The majority opinion incorrectly states that "the hospital first attempted to purchase M & M. . . . "

(continued...)

their fundamental purpose of increasing competition by encouraging new entry and discouraging unnecessary consolidation, then ultimate skepticism should be reserved for plaintiffs, like M & M, who first seek to sell, and then sue when a competitor refuses to pay a premium for the offer to exit the market.

Respectfully submitted,
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[21](...continued)
However, the record reveals that is was M & M that first approached the hospital.

APPENDIX B

Filed: January 20, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3100
(CA-88-1099-A)

M & M Medical Supplies and Service, Inc.
Plaintiff-Appellant,

versus

Pleasant Valley Hospital, etc., et al.
Defendants-Appellees.

ORDER

The Court amends its opinion filed December 9, 1992, as follows:

On page 5, third full paragraph, line 9 -- the name "Galia" is corrected to read "Gallia."

On page 6, second full paragraph, line 6 -- the phrase "motion to summary judgment" is corrected to read "motion for summary judgment."

On page 18, second full paragraph, line 7 -- the word "Higlands" is corrected to read "Highlands."

On page 21, third full paragraph, line 3 -- the cross-reference to "ante at 11-12" is corrected to read "ante at 11-13."

On page 22, first full paragraph, line 4 -- the cross-reference to "Ante at 12" is corrected to read "Id."

On page 24, first full paragraph, line 4 -- the cross-reference to "Ante at 13" is corrected to read "Ante at 12."

On page 24, second full paragraph, line 15 -- the cross-reference to "supra at 2-4" is corrected to read "supra at 18-21."

On page 24, footnote 5, line 2 -- the cross-reference to "supra at 3-4" is corrected to read "supra at 20-21."

For the Court - By Direction

/s/ Bert M. Montague
Clerk

(3)

FILED
JUN 1 1993
OFFICE OF THE CLERK

No. 92-1685

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PLEASANT VALLEY HOSPITAL, INC., and
PLEASANT VALLEY HOME MEDICAL
EQUIPMENT, INC.,
Petitioners,

v.

M & M MEDICAL SUPPLIES AND SERVICE, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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IN THE

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PLEASANT VALLEY HOSPITAL, INC., and
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Petitioners,

v.

M & M MEDICAL SUPPLIES AND SERVICE, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI WAS TIMELY AS IT WAS FILED WITHIN 90 DAYS AFTER THE FOURTH CIRCUIT'S DENIAL OF PETITIONERS' PETITION FOR REHEARING

Rule 40(a) of the Federal Rules of Appellate Procedure ("Rule 40(a)") was designed to permit reconsideration of a case where a court has overlooked or misapprehended points of law or fact.[1] The Petition for Rehearing

[1] It makes little sense to argue, as Respondent does, that a petition for rehearing of an en banc decision must be addressed to a panel of the court, and there is nothing in *Missouri v. Jenkins*, 110 S.Ct. 1651, 1661 (1990), that holds to the contrary. That case deals with a request for reconsideration of a decision of a panel of the circuit court, not a request for reconsideration of a decision of the court sitting en banc. Rule 40(a), by its terms, does not

filed by Petitioners was designed to do precisely that. Indeed, it is explicitly described as a Petition for Rehearing under Rule 40(a).[2] Appendix A to Response Brief in Opposition to Petition for Writ of Certiroari ("Resp. App.") at 2a. Moreover, even the most cursory examination of the issues presented by the Petition for Rehearing indicates that the focus of the Petition was the issues of fact and law overlooked by the en banc majority.[3] *Id.*

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limit petitions for rehearing to the reconsideration of panel decisions. Clearly, there is every reason to believe that Rule 40(a) encompasses situations where the en banc majority has overlooked material facts or points of law.

[2] The words "en banc" were included in the title of the Petition for Rehearing only because it is obvious that a panel of the circuit could not reconsider an initial en banc determination by the court. Yet, there can be no doubt that the purpose of the petition was to focus on points of law and fact which were overlooked by the en banc majority in its decision. Appendix A to Response Brief in Opposition to Petition for Writ of Certiorari ("Resp. App.") at 2a. This is precisely what Rule 40(a) is designed to do. *See* Fed. R. App. P. 40(a).

[3] In contrast, a suggestion for rehearing en banc is granted only where consideration by the full court is necessary to secure or maintain uniformity of the court's decisions, or when the proceeding involves a question of exceptional importance. *See* Fed. R. App. P. 35(a). Almost by definition, these reasons would rarely be applicable where the initial decision is one by the court sitting en banc, rather than a decision of a panel of the court. Any en banc decision is controlling within a circuit, and conflicts between en banc decisions within a circuit are far less likely to occur than conflicts between panel decisions within the circuit. Of course, en banc decisions are likely to involve matters of exceptional importance, indeed, that may well explain why the issues were considered en banc by the court in the first instance. However, in a case, such as this, which already has been decided by the court sitting en banc, the importance of the issue, by itself, hardly justifies en banc reconsideration of that issue, unless the en banc majority initially has overlooked important points of law or fact. But such matters are addressed under Rule 40, not Rule 35.

Similarly, there can be no doubt that the court of appeals treated the Petition as one for rehearing under Rule 40, rather than as a suggestion for rehearing en banc under Rule 35 of the Federal Rules of Appellate Procedure ("Rule 35"). Indeed, the circuit court's January 22, 1993 Order denying the Petition for Rehearing explicitly states "the appellees' *petition for rehearing* in banc was submitted to this Court," and concludes that "IT IS ADJUDGED AND ORDERED that the *petition for rehearing* in banc is denied." Appendix E to the Petition for a Writ of Certiorari ("Appendix") at 58a (emphasis added) (all capitals in original).

Moreover, it is in itself determinative that the Fourth Circuit's mandate was issued on January 29, 1993, exactly seven days after the circuit court denied the Petition for Rehearing. Rule 41(a) of the Federal Rules of Appellate Procedure ("Rule 41(a)") provides that

> [t]he timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the *mandate shall issue 7 days after entry of the order denying the petition* unless the time is shortened or enlarged by order.

Fed. R. App. P. 41(a) (emphasis added). In contrast, if the Fourth Circuit had treated the Petition for Rehearing as a suggestion for rehearing en banc, the court would have been obliged by Rule 41(a) to issue its mandate within 21 days after the en banc decision, which was rendered on December 9, 1992, rather than seven days after the denial of the Petition for Rehearing. Fed. R. App. P. 41(a). This Court has held that the failure of a court of appeals to issue a mandate within 21 days of its decision indicates that the court intended to treat even an ambiguous rehearing request as a petition for rehearing within the meaning of Rule 40(a), rather than as a suggestion for rehearing en banc pursuant to Rule 35(a). *Missouri v. Jenkins*, 110 S. Ct. 1651, 1661 (1990).

In arguing that the Fourth Circuit Court of Appeals intended to treat the Petition for Rehearing as a "sugges-

tion for rehearing in banc", Respondent argues that "Judge Butzner, the only senior circuit judge on the in banc panel, was not permitted to vote on whether to rehear the case." Response Brief in Opposition to Petition for Writ of Certiorari ("Response") at 7.[4] However, the fact that Judge Butzner did not vote on the Petition for Rehearing is hardly probative. Indeed, it is arguable that under the applicable statute, circuit courts of appeal may not permit senior circuit judges to participate in a vote to decide whether the en banc court will rehear a case. The authority of circuit courts of appeal to grant hearings and rehearings en banc is governed by 28 U.S.C. § 46(c). That section provides, in pertinent part, that cases are to be heard by panels of not more than three Judges "unless a hearing or rehearing before the court in banc is *ordered by a majority of the circuit judges of the circuit who are in regular active service.*" *Id.* (emphasis added). Although this Court has never held that senior circuit judges may not decide whether an en banc decision of a circuit court should be reconsidered, it did instruct the Fourth Circuit, in a somewhat different context, that "the language of the present statute [28 U.S.C. § 46(c)] thus confines the power to order a rehearing in banc to those circuit judges *who are in 'regular active service.'*" *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974) (emphasis added).[5]

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[4] In fact, the Fourth Circuit's January 22, 1993 Order does not say that Judge Butzner was not permitted to vote. Appendix E at 58a. Rather, it say only that the Petition for Rehearing "was submitted to this Court." *Id.* In addition, while the Order does not list Judge Butzner as casting a vote on the issue of rehearing, it does indicate that the Order denying the Petition for Rehearing was entered at the "direction of Judge Butzner." *Id.*

[5] Nor can the Respondent derive significance from the fact that a poll of the court was requested. Appendix E at 58a. Indeed, the Order states only that a poll was requested, not that such a poll was required. *Id.* In any event, it probably would be permissible for the Fourth Circuit to determine that a poll must be requested before a vote will be taken on a petition for rehearing

In sum, there can be no dispute that Petitioners intended to treat the Petition for Rehearing as a petition pursuant to Rule 40(a). Indeed, the petition itself so states. Resp. App. A at 2a. Moreover, there can be no doubt that the Fourth Circuit Court of Appeals, itself, viewed the Petition as one for rehearing under Rule 40. Under these circumstances, it is clear that "the time for filing the petition for a writ of certiroari . . . runs from the date of the denial of the petition for rehearing . . . ." Sup. Ct. R. 13.4.[6]

II. THERE IS A CLEAR CONFLICT BETWEEN THE RULE 56(e) STANDARD APPLIED BY OTHER CIRCUITS AND THAT APPLIED BY THE FOURTH CIRCUIT TO DR. BLAIR'S AFFIDAVIT

In addressing the issue of whether there is a conflict among the circuits regarding the proper standard to be

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of an en banc decision of the court. As this Court has stated, in a different context,

> [w]e hold that the statute is simply a grant of power to order hearings and rehearings *en banc* and to establish the procedure governing the exercise of that power. We hold that litigants are given no *statutory* right to compel each member of the court to give formal consideration to an application for a rehearing *en banc*.

Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247, 267 (1953) (emphasis in original).

[6] Even if the Court were to conclude that the court of appeals was incorrect in treating the Petition for Rehearing as one under Rule 40, any Justice of this Court may grant a 60-day extension of time for the filing of a petition for a writ of certiorari "for good cause shown." 28 U.S.C. § 2101(c). Certainly, the Petitioners' justifiable reliance on the court of appeals' action constitutes good cause. Admittedly, this Court's Rules require an application for an extension of time to be presented during the initial 90-day period. Sup. Ct. R. 30.2. However, the statute does not limit the power of any Justice of the Court to grant, sua sponte, an extension to file a petition for a writ of certiorari. *See* 28 U.S.C. § 2101(c). Given Petitioners' reliance on the court of appeals' treatment of the Petition for Rehearing, there is a clear basis for such action.

applied to expert affidavits under Rule 56(e) of the Federal Rules of Civil Procedure ("Rule 56(e)"), Respondent either misapprehends or seeks to obscure the clear distinction which exists between "underlying facts" (which need not be supplied by the expert under Rule 705 of the Federal Rules of Evidence ("Rule 705")), and "specific facts" (which must be supplied by the expert to support the validity of an affidavit under Rule 56(e)). The conflict among the circuits lies in the disharmony that exists with regard to the precise meaning of these terms. What some courts call "underlying facts" are clearly seen by others to be "specific facts." Moreover, the converse is also true.

All of the cases cited by the en banc majority, as well as the en banc majority decision itself, treat the "specific facts" which form the basis of the expert's opinion, and the "reasoning" (or methodology) applied by the expert as constituting "underlying facts." *See* Appendix A at 6a-10a; *Ambrosini v. Labarraque*, 966 F.2d 1464, 1470-71 (D.C. Cir. 1992); *Monks v. General Elec. Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990); *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316-18 (9th Cir. 1985). Under the standard in these cases, neither the specific factual basis of the opinion, nor the reasoning (or methodology) applied by the expert is seen as essential to the validity of an expert's affidavit. Rather, it is sufficient for an expert merely to identify or enumerate the broad "rubrics," or types of data or facts considered.

In stark contrast to this approach, other circuits have been explicit and, indeed, unequivocal in requiring experts to furnish the specific factual and methodological bases upon which they rest their conclusions. For these courts, the "specific facts" required by Rule 56(e) are quite distinct from "underlying facts" that need not be provided under Rule 705. While the "underlying facts" (which consist of the "raw data" analyzed by the expert) need not be provided, the specific facts derived,

through analysis, from the underlying data, must be provided to satisfy Rule 56(e). In addition, there is also a clear and explicit conflict among the circuits with regard to whether Rule 56(e) requires experts to provide the "reasoning" or methodology applied in reaching their conclusions. *Compare Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989); *Evers v. GMC*, 770 F.2d 948, 986-87 (11th Cir. 1985); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977) *with Bulthuis*, 789 F.2d at 1318.

III. THE ISSUE OF WHETHER DR. BLAIR RELIED ON FACTS OF THE TYPE REASONABLY RELIED UPON BY ECONOMIC EXPERTS IS NOT A NOVEL ISSUE IN THIS CASE

Respondent's statement that "this [Petition for a Writ of Certiorari] is the first time that this issue has arisen in the five year history of the case" is simply untrue. Response at 14. Respondent asserts that

> Petitioners never mentioned it [the issue of Dr. Blair's reliance on facts not of the type relied upon by economic experts] in . . . their brief in support of their petition for rehearing of the panel opinion, in their brief in support of their 'Petition for Rehearing en banc,' in any of their supplemental briefs, or in any of their oral arguments.

Id. However, Petitioners treat this issue in the Petition for Rehearing en banc explicitly, and at length, and include much of the relevant case law cited to by this Court. Indeed, the Petition for Rehearing is itself included as an Appendix to the Respondent's Response. *See* Resp. App. A at 3a-4a, nn. 1 & 2, 4a, 6a-11a. The fact that Petitioners previously raised the issue must have been known to Respondent.

In the Petition for Rehearing, Petitioners state that "[a]s an expert, Dr. Blair was required to support his expert opinions by reliance on facts of a type relied on by economic experts." *Id.* at 4a. While the case law cita-

tions in prior briefs are less inclusive, the essential cases are cited to and discussed in earlier briefs as well, including Petitioner's Petition for Rehearing, and Suggestion for Rehearing En Banc; and Petitioners' Reply to Respondent's Opposition to that Petition.

IV. THERE IS A CONFLICT BETWEEN THE FOURTH CIRCUIT'S OPINION AND THIS COURT'S DECISION IN *SPECTRUM SPORTS*

Even a cursory reading of Petitioners' arguments reveals the conflict between the approach taken by the Fourth Circuit and that established by this Court, in *Spectrum Sports, Inc. v. McQuillan,* 113 S. Ct. 884 (1993), regarding the appropriate standard to determine a dangerous probability of success. Petitioners do not argue that the en banc majority has done away with the dangerous probability of success element of attempted monopolization. *See* Petition for a Writ of Ceriorari at 21-23. Rather, Petitioners argue that the Fourth Circuit's standard impermissibly permits the existence of market power to be determined by factors unrelated to market power.

The en banc majority stated that

> [m]arket share is relevant, but its relevance is tempered by evidence of the other two elements of the claim. Compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown.

Appendix A at 15a. Respondent itself concedes that "Petitioners correctly point out that market share is but a surrogate or proxy for the existence of monopoly or market power." Response at 17. Thus, it is clear that the Fourth Circuit's standard permits the amount of evidence required to establish a dangerous probability of monopolization to be determined by the amount of evidence regarding factors unrelated to the existence of monopoly or market power. Such a standard is clearly in-

consistent with this Court's holding in *Spectrum Sports*, 113 S. Ct. at 889-92.[7]

V. THE FOURTH CIRCUIT DECISION FORCES PETITIONERS TO A TRIAL ON THE ISSUE OF MONOPOLY LEVERAGING

The en banc majority did accept the existence of monopoly leveraging as a separate violation of Section 2 of the Sherman Act for purposes of trial, thereby implicitly rejecting the position taken by this Court in *Spectrum Sports*, 113 S. Ct. at 889-92, and the decisions of two other circuits. The en banc court stated that it would

> assume for purposes of remand that monopoly leveraging is a separate violation of section 2. There will be time enough to evaluate the validity of this assumption after the parties have developed a *factual* record.

Appendix A at 16a (emphasis added). However, the question of whether monopoly leveraging is a separate and cognizable cause of action under the antitrust laws is a question of law, not a question of fact. The district court squarely addressed the issue of the existence of monopoly leveraging as a separate and cognizable cause of action in holding that

> Section 2 of the Sherman Act clearly does not provide a cause of action for conduct so denominated [i.e., monopoly leveraging]. The Plaintiff's allegations of leveraging merely state a claim for attempted monopolization.

Appendix C at 51a. Consequently, the en banc majority should have reviewed the district court's conclusion. If

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[7] Because *Spectrum Sports* was decided on January 25, 1993, the en banc court could not have considered it. However, the existence, and significance of the case were pointed out. *See, e.g.*, Resp. App. A at 11a-12a, n.13.

the district court was correct, Petitioners should not be put to the expense of trial on the issue.[8]

CONCLUSION

In its Response, Respondent has put forward no valid arguments in opposition to this Court granting a Writ of Certiorari in this case.

For the foregoing reasons, Petitioners respectfully submit that the reasons put forward by Petitioners in favor of a grant of certiorari remain valid and compelling, and request that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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[8] There is no doubt that the scope of trial would be expanded by a claim for monopoly leveraging. Such a claim, for the first time, would put at issue the question of the relevant geographic market for hospital services, and the existence (or non-existence) of Petitioner Pleasant Valley Hospital's monopoly power in that market.